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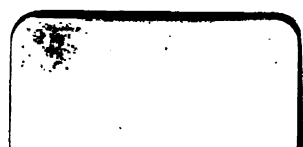
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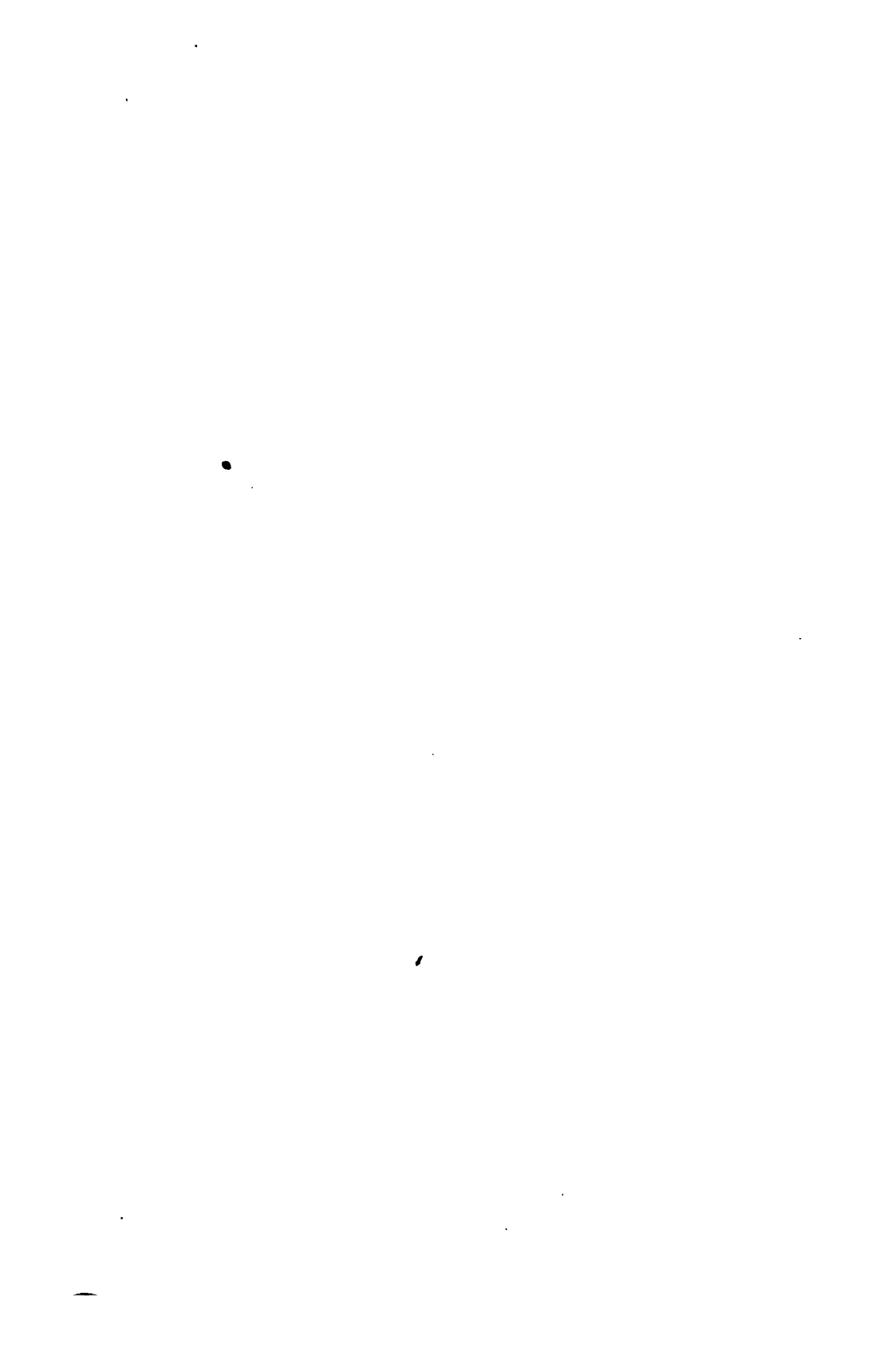
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3433

PACIFIC COAST LAW JOURNAL,

CONTAINING ALL THE

Decisions of the Supreme Court of California,

AND THE IMPORTANT DECISIONS OF THE

*U. S. CIRCUIT AND U. S. DISTRICT COURTS FOR THE DISTRICT
OF CALIFORNIA, AND OF THE U. S. SUPREME COURT
AND HIGHER COURTS OF OTHER STATES.*

W. T. BAGGETT, EDITOR.

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Pacific Coast Law Journal.

VOL. X.

AUGUST 26, 1882.

No. 1.

Current Topics.

ASSIGNMENT OF INSURANCE POLICIES.

In the confusion resulting from the conflict of decisions upon the validity of assignment of insurance policies, we welcome the recent decision of the U. S. Supreme Court upon this question.

The Appellate Court of New York holds that such an assignment is valid. The Appellate Court of Massachusetts takes a different view, and holds such an assignment valid only as security for the repayment of the sums paid upon it with interest. In this latter view the Supreme Court of the United States concurs. Justice Field writes the opinion, and bases the decision upon the sole ground that the assignee has no "insurable interest" in the life of the deceased, beyond the money advanced, and could not therefore have taken out a policy in his own name. He defines an "insurable interest" to be "such an interest, arising from the relations of the party obtaining the insurance, *either as creditor of or security for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.*" (*Warwick vs. Davis*, Ky. Law Reporter, August, 1882.)

This same view is taken by the author of *May on Insurance* (page 600, 2d Edition), and by the Supreme Court of Indiana.

THE platform of "justice to all" is large enough on which to erect and maintain a republic, and any departure from this endangers its existence.

HE who can contemplate his past and not receive many warnings from it, must have had a remarkable stupid existence.

HONOR the old, instruct the young, consult the wise, and bear with the foolish.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed August 22, 1882.]

No. 8092.

EBY AND WIFE, RESPONDENTS,

VS.

FOSTER ET AL., APPELLANTS.

HOMESTEAD—EXCHANGE OF LANDS—JUDGMENT LIEN—DOCKETING. *Per McKee, J.:* Plaintiff, Jackson Eby, had acquired title to the property November 3, 1880, from one Rambo, in exchange for certain parcels of land in the town of Red Bluff, which the plaintiffs, before the exchange of properties, had occupied as their homestead; and their intention in making the exchange was to secure a homestead in the country instead of in town. Simultaneously with drafting the deeds of exchange, a declaration of homestead, legal in form, upon the property in dispute, was drawn, and this declaration, with the two deeds of exchange, were, at the same time, in regular succession, executed and acknowledged and filed for record—the deed to Rambo for the town lots being recorded first, at four minutes past 3 o'clock p. m., the deed to Eby, for the land in the country, at six minutes past 3 o'clock p. m., and the declaration of homestead upon the land in the country at eight minutes past 3 o'clock p. m. of November 3, 1880. But a judgment against Eby, in which execution had run to the Sheriff, had been given and entered on November 9, 1878; and, on the day of the recording of the deeds of exchange and the declaration of homestead by Eby and wife, this judgment existed unsatisfied of record. *Held:* It is by docketing the judgment that a lien is created, and it runs for two years from and after that time. The time must appear by the record; for, as the lien is purely statutory, neither its existence nor commencement can be proved by parol.

Id.—Id. At the time of filing the homestead declaration upon the property in dispute, there existed no enforceable judgment lien upon the property, and, the property being homestead, it was not subject to execution for the satisfaction of the judgment.

Id.—Id. The evidence sustains the finding that plaintiffs resided on the land in dispute at the time of the exchange of properties and of the making and filing of the declaration of homestead.

Id.—Id. *Myrick, J., and McKinstry, J.,* concurred in the judgment on the ground that the delivery of the deed from Eby to Rambo, and of the deed from Rambo to Eby, and the filing of the same for record, together with the declaration of homestead, were simultaneous acts and constituted one transaction; that the moment the title to the premises in question vested in Eby the homestead right attached; therefore the premises were exempt from the levy of the execution (dated Nov 6, 1880) and sale thereunder, and were not subject to the lien of the judgment.

Appeal from Superior Court, Tehama County.

J. F. Ellison, for appellants.

Chipman & Garter, for respondents.

McKEE, J., delivered the opinion of the Court (Myrick, J., and McKinstry, J., specially concurring):

Defendant Foster, as Sheriff of Tehama County, by an execution which had been issued on a money judgment in favor of his co-defendant Campbell against Jackson Eby, one of the plaintiffs in this case, levied upon and advertised for sale the southwest quarter, and the west half of the southeast quarter of section 8, township 26 north, range 5 west, Mount Diablo meridian, as the property of the judgment debtor.

Before the day appointed for the sale the plaintiffs in this case brought their action to enjoin the sale, upon the ground that the property constituted their homestead, and was exempted from execution, levy, and sale.

The record shows that the plaintiff, Jackson Eby, had acquired title to the property on November 3, 1880, from one Rambo, in exchange for certain parcels of land in the town of Red Bluff, which the plaintiffs, before the exchange of properties, had occupied as their homestead; and their intention in making the exchange, was to secure a homestead in the country instead of in town. The exchange and the declaration of homestead constituted a single transaction. Simultaneously with drafting the deeds of exchange, a declaration of homestead, legal in form, upon the property in dispute, was drawn, and the declaration with the two deeds of exchange were, at the same time, in regular succession, executed and acknowledged and filed for record—the deed to Rambo for the town lots being recorded first, at four minutes past 3 o'clock P. M., the deed to Eby, for the land in the country, at six minutes past 3 o'clock P. M., and the declaration of homestead upon the land in the country, at eight minutes past 3 o'clock P. M., of November 3, 1880. But the judgment against Eby, on which execution had run to the Sheriff, had been given and entered on November 9, 1878; and on the day of the recording of the deeds of exchange and the declaration of homestead by Eby and wife, this judgment existed unsatisfied of record; and the question arises, whether the judgment was docketed, so as to create a lien upon the property, when the plaintiff acquired title to it from Rambo, before the declaration of homestead upon it was recorded?

Between the delivery of the deed to Eby and the recording of the declaration of homestead there was an interval of several minutes. That time was sufficient for the existing lien of a judgment to attach to the property. (*Marriner vs. Smith*, 27 Cal. 650; *Hibbard vs. Smith*, 50 Id. 511.) But no

judgment lien is created upon real property belonging to a judgment debtor until the judgment be docketed. (Sec. 671, C. C. P.) Docketing a judgment consists of an entry in the docket in the clerk's office of a brief abstract of the judgment. The docket in which this entry must be made is "a book with each page divided into eight columns and headed as follows: Judgment debtors; judgment creditors; judgment—time of entry; where entered in judgment book; appeals—when taken; judgment of appellate Court; satisfaction of judgment; when entered," etc. (672, C. C. P.); and the law has made it the duty of the clerk to enter in this docket the title of each cause, with the date of its commencement, and a memorandum of every subsequent proceeding therein, with the date thereof. (Sub 3, Sec. 4204, Pol. Code.)

The entry thus required to constitute the docketing "must be made immediately after attaching together and filing the papers which constitute the judgment roll in the case." (Sec. 671, C. C. P.) These things must be done to create a judgment lien upon real property; if they are not done as required by law there is no lien.

Now, at the trial, it was admitted that no judgment roll had been made up in the case under consideration; and it was proved that the entry which the clerk made in his docket showed only the names of the judgment creditor and debtor, the amount of the judgment and date on which it was given, and entry of judgment and the date of issuance of execution. That of the judgment and entry of judgment is given as November 9, 1878, and the date of the issuance of execution as November 6, 1880. But *when* the entry of the abstract of the judgment was made on the docket is not given, unless it must be presumed that it was made on November 9, 1878—the date of the rendition and entry of the judgment, or on November 6, 1880—the date of the issuance of the execution. If the docketing took place on the former, *i. e.*, November 9, 1878, the lien of the judgment commenced on that day, and ended just three days *after* the execution had been issued, and there existed no judgment lien enforceable by execution at the time appointed for the sale of the property to satisfy the judgment. (*Bagley vs. Ward*, 37 Cal. 121; *Rogers vs. Druffel*, 46 Id. 654.) If, on the other hand, the judgment was docketed on November 6, 1880, the lien then created did not attach to the property in controversy, because it was then the homestead of the plaintiffs. (*Bowman vs. Norton*, 16 Cal. 213.)

A judgment lien must have a commencement. If it exists, its commencement is the day when the judgment was

docketed, for it is by docketing the judgment that the lien is created; and it runs for two years from and after that time (*Ackley vs. Chamberlain*, 16 Cal. 181; *Barroilhet vs. Hathaway*, 21 Id. 395; *Rogers vs. Druffel*, *supra*; Sec. 671. C. C. P.); and the time must appear by the record; for, as the lien is purely statutory, neither its existence nor commencement can be proved by parol. (*Racouillat vs. Requena*, 36 Cal. 651; *Norris vs. Jackson*, 9 Wall. 126.)

Whence it follows that, at the time of filing the homestead declaration upon the property in dispute, there existed no enforceable judgment lien upon the property; and, the property being homestead, it was not subject to execution for the satisfaction of the judgment.

The Court by its general verdict found, and the evidence sustains the finding, that the plaintiffs resided on the land in dispute at the time of the exchange of properties and of the making and filing of the declaration of homestead. There is no error in the record prejudicial to the appellants.

Judgment and order affirmed.

CONCURRING OPINION.

We concur in the judgment, upon the ground that the delivery of the deed from Eby to Rambo, and of the deed from Rambo to Eby, and the filing the same for record, together with the declaration of homestead, were simultaneous acts, and constituted one transaction; that the moment the title to the premises in question vested in Eby, the homestead right attached; therefore the premises were exempt from the levy of the execution and sale thereunder, and were not subject to the lien of the judgment. The witness Eby testified that the three papers were placed with the Recorder for record at the same time, and we presume that the Court below relied in its judgment upon that testimony, rather than on the conflicting testimony.

MYRICK, J., MCKINSTRY, J.

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 8202.

ILL. ET AL., RESPONDENTS, VS. BEATY ET AL., APPELLANTS.

FAULT—JUDGMENT—MOTION—ANSWER—MISTAKE—NEGLECT—PRACTICE—
SENT. Motion to set aside judgment on the ground of mistake, etc.,
 and for leave to file an answer. *Held*, the neglect of the moving de-
 fendant to file an answer was inexcusable.

- Id.—**NEW TRIAL.** As both defendants moved for a new trial in the case, and permitted the statutory time for opening the judgment, on the ground of neglect, mistake, etc., to expire, the present motion, if either party was entitled to make it after the denial of a motion for a new trial in the case, comes too late. (473, C. C. P.)
- Id. *Further:* The motion for a new trial was not made as prescribed by Sections 658–9, Code of Civil Procedure, and was properly denied.
- Id.—**PLEADING—LEASE—COVENANT.** There was no error in striking out portions of the defendants' answer. One part contained a denial of indebtedness, another a covenant in the original lease made in 1879, by which the lessors had agreed to make an improvement upon the leased premises "on or before the first of August, 1879." The improvement was not made, and for not making it the defendants asked damages, and the other part set up a failure to repair. There is no covenant to repair in the lease of 1879, or in that of 1880, (the lease sued on,) and the former covenant had ended.
- Id. There is no covenant in the lease of 1880 about improvements on the premises leased in 1879. All the installments of rent due had been paid, except the last installment on the lease of 1880, which the action was brought to recover. The matter struck out was, therefore, irrelevant and redundant.
- Id. The motion to file an amended and supplemental answer containing the same matter, was also properly denied.
- FINDING.** The finding covers all the issues in the case, and there is no error in the judgment.
- DENIAL.** A denial of indebtedness is a denial of a conclusion of law.

Appeal from Superior Court, Sacramento County.

Cadwalader, Devlin, and Martin & Jones, for appellants.
McKune and Wallis, for respondents.

McKEE, J., delivered the opinion of the Court:

This was an action to recover an installment of rent alleged to be due and owing by the defendants on a contract of lease, dated April 15, 1880.

Defendants appeared and answered in the case, and judgment was rendered against them on April 14, 1881. Six days afterwards their attorneys gave notice of motion for a new trial, and, on October 6, 1881, that motion was heard, upon a settled statement of the case, and denied. On the twenty-first of the same month the defendant Leslie gave notice of a motion to open the judgment and permit him to file a separate answer, upon the ground that the answer filed and the judgment taken in the case were the result of the mistake, inadvertence, or surprise, or excusable neglect of himself and his co-defendant. It is out of this motion that the present contention arises.

But the mistake, inadvertence, surprise, or excusable neglect in the case, if any, was not attributable to Leslie. He, when a copy of the complaint and summons were personally served on him, sent them to his co-defendant Beaty, and

asked him to have the case properly defended. The latter wrote that that would be done, and, it seems, that he *had* covenanted to defend Leslie against any suits upon the lease. Upon *that*, Leslie gave no further attention to the case.

It does not appear that Leslie informed Beaty that he wanted any special defense interposed in the action. But Beaty knew that he himself only had renewed the lease, and that Leslie had not joined in the renewal. Yet, with full knowledge of the fact, Beaty neglected to state it to the attorneys whom he had employed to defend the case, and, in consequence, it was not set up in the answer filed for himself and Leslie. On the contrary, the execution of the original lease on the 15th of April, 1879, and its subsequent renewal on the 15th of April, 1880, by both defendants, were admitted, and the only issue raised by the pleadings in the case was, whether the demanded installment of rent was due and unpaid.

. Under these circumstances, the neglect to set up in the answer any special defense which Leslie may have had, was chargeable to Beaty—it was not the neglect of Leslie. No cause is assigned which prevented Beaty from performing his duty, nor is any reason given why he did not perform it; his neglect, therefore, was not excusable—it was in fact wholly inexcusable; and as both defendants moved for a new trial in the case, and permitted the statutory time for opening the judgment on the ground of neglect, mistake, etc., to expire, the present motion, if either party was entitled to make it, after the denial of a motion for a new trial in the case, comes too late.

If by Beaty's neglect, Leslie has been deprived of any of his rights, he may be redressed by an action against Beaty; or if the judgment was taken against him by the actual fraud of the plaintiffs, or of the plaintiffs and Beaty, unmixed with negligence on his part, his remedy may be in an original action in equity to set aside the judgment. (*Bibend vs. Kreutz*, 20 Cal. 108; *Riddle vs. Baker*, 13 Id. 195.)

The motion for a new trial was not made as prescribed by Sections 658-9, C. C. P. and was properly denied.

There was no error in striking out portions of the defendants' answer. One part contained a denial of indebtedness, another a covenant in the original lease made in 1879, by which the lessors had agreed to make an improvement upon the leased premises "on or before the first of August, 1879." The improvement was not made, and for not making it the defendants asked damages; and the other part set up a failure to repair.

There is no covenant to repair in the lease of 1879, or in that of 1880, and the former covenant had ended.

A denial of indebtedness is the denial of a conclusion of law.

There is no covenant in the case of 1880 about improvements on the premises leased in 1879. All the installments of rent due had been paid, except the last installment on the lease of 1880, which the action was brought to recover. The matter struck out was, therefore, irrelevant and redundant.

The motion to file an amended and supplemental answer containing the same matter was also properly denied.

The finding covers all the issues in the case, and there is no error in the judgment.

Judgment and order affirmed.

I concur: Myrick, J.

CONCURRING OPINION.

I concur. The motion to open the judgment came too late, as the judgment was entered more than six months before the motion was made. (C. C. P. 473.)

McKINSTRY, J.

DEPARTMENT No. 2.

[Filed August 24, 1882.]

No. 8156.

YOUNGLOVE, APPELLANT, vs. NIXON, RESPONDENT.

ACTION—NOTE—ANSWER—ACCOUNT. Action upon a promissory alleged to have been given in settlement of an account. Defendant denied the accounting, etc. *Held*, conceding that some portions of the answer are insufficient, there was enough in it to constitute a defense to the action. *Further*, it does not appear that the error complained of (overruling demurrer to answer,) affected any substantial right to plaintiff. (475, C. C. P.)

Appeal from Superior Court, Amador County.

Farley & Porter, and *Armstrong*, for appellant.
Carter and Brown, for respondent.

By the Court:

Plaintiff brought this action on a promissory note for \$1,599.45, and the defendant set up several matters of defense in his answer. There was a demurrer to the answer,

which was overruled by the Court, and on the trial of the case a verdict was rendered in favor of the defendant. The case comes before this Court on the judgment roll, and appellant assigns as error the order of the Court overruling the demurrer to the answer.

It may be conceded that some portions of the answer are insufficient, but there was enough matter in it, well pleaded, to constitute a good defense to the action. It does not appear from anything found in the transcript, that the error complained of, affected any substantial right of the plaintiff (Sec. 475, C. C. P.); and the judgment is therefore affirmed.

IN BANK.

[Filed July 28, 1882.]

No. 8318.

LOS ANGELES, RESPONDENT,

VS.

LAMB ET AL., APPELLANT.

FEES—LOS ANGELES—RECORDER—CONSTITUTION—STATUTE. The Act of April 27, 1878, "To regulate fees and salaries in the county of Los Angeles" (Stats. 1877-8, p. 57), was a perfect law when it was approved and went into effect when the other portions of the law did. Because it happened that there was then an incumbent to which the statute *did not apply*, and whose term did not expire until March, 1880, did not prevent the statute from going into effect, but merely postponed its operation as to the successor of the incumbent until he took office. It did not operate in this case until March, 1880, because the *casus statuti* did not exist until that date, but it was still a perfect statute, clothed with all the force and strength that the legislative power could invest it with. *Accordingly*, in this action to recover fees collected between the 1st and 31st of December, 1881, the judgment was properly rendered for plaintiff.

Appeal from Superior-Court, Los Angeles County.

Brunson & Wells, and *Bicknell & White*, for appellants.
Thomas B. Brown, for respondent.

THORNTON, J., delivered the opinion of the Court:

The statutes of April 27, 1878 (Stats. 1877-8, p. 574), was perfect law when it was approved on the day above named, and went into effect when the other portions of the law did. Because it happened that there was then an incumbent to which the statute *did not apply*, and whose term did not expire until March, 1880, did not prevent the statute of 1878 from going into effect, but merely postponed its operation

as to the successor (Lamb) of the incumbent until he took office. It did not operate in this case until March, 1880, because the *casus statuti* did not exist until that date, but it was still a perfect statute, clothed with all the force and strength that the legislative power could invest it with.

The statutes passed on in the cases referred to (*Peachy vs. Board of Supervisors* and *Spergle vs. Joy*) are entirely different. In those statutes it was specially provided, as far as the matters involved in the cases cited, the Act should not go into effect until a future day. This is quite a different thing from saying it shall not apply to an existing state of things, which may be changed any day after the passage of the Act, viz., by the death of the then incumbent, when on his successor taking office a *status* would occur and exist to which the statute must *per force* apply. The statute then operated. It went into effect when it was passed, but did not operate then because there was no case for it to operate on. As soon as the case occurred, it found operation. The distinction is between having an operative effect, and going into effect. The statute may go into effect, but cannot operate until the *casus statuti* occurs.

We are of opinion that the judgment of the Court below is correct, and should be affirmed.

We concur: Sharpstein, J., Ross, J.

CONCURRING OPINION.

It is admitted that the defendant was elected, at the general election of 1879, Recorder of the county of Los Angeles, qualified as such and entered upon the discharge of the duties of his office March 1, 1880; and that, during the month of December, 1881, while in office, he collected the fees of office in controversy.

These fees, during his incumbency, were, under the statute of April 24, 1878, to be paid into the Treasury of the county; for although the provision of the statute of 1878, upon that subject, was, according to its terms, not to take effect upon the *then* incumbent, it was to take effect upon his successor; and the defendant, having been elected as the successor in office of the *then* incumbent, he became subject to the operation of *all* the provisions of the statute. As to him, the office became, by force of the statute, a salaried one, and the duty was imposed upon him of collecting the fees of the office and paying them into the County Treasury.

The special provision of the statute as to compensation, and collection and disposal of the fees of the office, which did not affect his predecessor in office, was operative on him.

for although it was not to take effect until a time and an event after the adoption of the Constitution, yet, as it was not inconsistent with any constitutional provision, it took effect at the time expressed by the will of the Legislature.

Therefore I concur in the conclusion of Mr. Justice Thornton.
MoKEE, J.

DEPARTMENT No. 2.

[Filed August 22, 1882.]

No. 8231.

WOLFLING, RESPONDENT,

VS.

RALSTON ET AL., APPELLANTS.

CONTRACT—LEASE—MINE. Plaintiff let to the defendants a certain mine under a written contract of lease which contained the following clause:

"The said parties of the second part are to prospect and work the said vein, lead, or lode, " " " and to pay to the party of the first part or his assigns, every week, twenty per cent. of all the gold that they may take from said vein, lead, or lode, or from the angles or spurs thereof; that they are to work the same without expense to the party of the first part, and keep the same free from any liens or incumbrances for work or labor done on, or for materials furnished for the working of said mine; that if the parties of the second part should take, during any week, gold sufficient to more than pay for the back expenses of working the said mine, then the party of the first part is to have one-third of the gold they may get from said mine after paying said working expenses. *Held*, the plaintiff was entitled to twenty per cent. of all gold taken from the mine at all events, and in case the defendants should take out during any week sufficient to more than pay for the back expenses of working the mine, the plaintiff was to have one-third of the gold taken from the mine after paying such working expenses."

Appeal from Superior Court, Tuolumne County.

C. Dorsey, for appellants.

Rodgers and Street & Street, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff let to the defendants a certain mine, under a written contract of lease which contained the following clauses:

"The said parties of the second part are to prospect and work the said vein, lead, or lode, in a good and workmanlike manner, with as little damage to the land for agricultural purposes as a proper mining of the same will permit, and to

pay to the party of the first part or his assigns, every week, twenty per cent. of all the gold that they may take from said vein, lead, or lode, or from the angles or spurs thereof; that they are to work the same without expense to the party of the first part, and keep the same free from any liens or incumbrances for work or labor done on, or for materials furnished for the working of said mine; that if the parties of the second part should take, during any week, gold sufficient to more than pay for the back expenses of working the said mine, then the party of the first part is to have one-third of the gold they may get from said mine after paying said working expenses.

"That, if the parties of the second part fail to keep the covenants aforesaid, then the party of the first part is at liberty to take full possession of said land and premises without recourse to law, as fully, to all intents and purposes, as if this lease had not been made. In witness whereof, the said contracting parties have hereunto set their hands and seals, the day and year first above written."

The following special issues were submitted to the jury:

"1. Did the plaintiff and the defendants execute the contract set forth in the complaint?

"Answer—Yes.

"2. Have the defendants, since the date of said contract, taken out any gold from the mining claim referred to in said contract; and, if they have, then how much have the defendants so taken out?

"Answer—\$1,344.85.

"3. Have the defendants paid, or offered to pay, to plaintiff, any portion of the gold taken by them from said claim since the date of said contract?

"Answer—No.

"4. If the defendants have taken out any gold from the claim referred to in the complaint, at what time and during what weeks did they take the gold, and how much each week?

"Answer—1881. Don't know; but during the time, July 23d to August 27th, \$1,344.85 was taken out.

"5. Have defendants taken out more than sufficient, during any one week, to pay all the back working expenses?

"Answer—No.

"6. Have the defendants taken enough to pay the back expenses, including all the gold they have taken out since they have had said lease?

"Answer—No.

"7. What was the total amount of gold the defendants have taken out since they have had the lease?

"Answer—\$1,344.85.

"What was the total amount of back working expenses of working said claim?

"Answer—\$3,146.85."

Judgment for plaintiff on findings, for possession of the property, and \$268.97 damages.

The contention on behalf of the defendants, is that as it appears from the findings that defendants did not take out sufficient gold to pay the *back expenses*, therefore the plaintiff was not entitled to any part thereof.

We do not so understand the contract, and to give it such a construction would defeat one of its clauses. The plaintiff was entitled to twenty per cent. of all gold taken from the mine at all events, and in case the defendants should take out during any week sufficient to more than pay for the back expenses of working the mine, the plaintiff was to have one-third of the gold taken from the mine after paying such working expenses. The construction given to the contract was the correct one, and the judgment is affirmed with ten per cent. damages.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed August 21, 1882.]

No. 8305.

DUNLAP & VAN FLEET, RESPONDENT,

vs.

THE STANDARD CON. MINING CO., APPELLANT.

ATTORNEY-AT-LAW—ACTION—SERVICES—FINDINGS. Action to recover for professional services as attorneys-at-law. On appeal, defendant claimed that plaintiffs were not employed by it, and that there was no evidence of the value of the services rendered. *Held*, the points were not well taken. *Further*, the evidence sustained the findings against defendant.

Appeal from Superior Court, Sacramento County.

Lloyd & Woods, for appellant.

S. S. Holl, for respondent.

By the COURT:

Action to recover one thousand dollars for professional services rendered defendant by plaintiffs as attorneys at law. Judgment as prayed for and appeal therefrom, as well as on an order of the Court, denying defendant's motion for new trial.

Two points are made on the appeal: First, that plaintiffs were not employed by defendant to render it any services, and second, there is no evidence of the value of the services rendered. Neither of those points is well taken. The findings of the Court below show that the plaintiffs were employed by an agent of the defendant who was authorized to employ them; that services were rendered the defendant by the plaintiffs, and that the value of such services was one thousand dollars. We think that the evidence was sufficient to sustain the findings of the Court below, and the judgment and order are affirmed with ten per cent. damages.

DEPARTMENT No. 2.

[Filed August 21, 1882.]

No. 8237.

JULIEN, APPELLANT,

VS.

RILEY, ASSIGNEE, ETC., RESPONDENT.

INSOLVENCY—APPEAL—EQUITY. If an order of the insolvency Court, staying proceedings against an insolvent is erroneous, the proper mode to obtain relief therefrom is by appeal.

ID.—ID. A Court of equity cannot be appealed to in such a case.

Appeal from Superior Court, Siskiyou County.

Edgerton, Warren, and Edgerton, for appellant.

Rhodes & Barstow, and Gillis, for respondent.

By the COURT:

The plaintiff filed his complaint in the Superior Court of Siskiyou County, in which he complained of a certain order made by the County Court of that county, in an insolvency proceeding, pending in the latter Court. The object of the suit is to obtain relief which was applied for by the plaintiff, and was denied him in the insolvency case. If the order of the County Court was erroneous, the proper mode to obtain relief therefrom was by appeal; and there is no sufficient ground shown by the complaint for the interposition of a Court of equity.

The demurrer to the amended complaint was properly sustained, and the judgment is affirmed.

DEPARTMENT No. 2.

[Filed July 27, 1882.]

No. 6997.

ESTATE OF CORWIN.

PROBATE COURT — APPEAL — UNDERTAKING ON APPEAL — ADMINISTRATOR — BOND. An order of the Probate Court directing the conveyance of real estate by an administrator is appealable. (969, C. C. P., Sub. 5.)

Id.—Id. Undertaking on appeal held sufficient, citing 970, C. C. P., providing that bond on appeal is not necessary where administrator has given an official bond.

Id.—SPECIFIC PERFORMANCE — PARTIES. The Probate Court should not award specific performance in the absence of all parties before it who have a right to be heard.

Id.—Id. The statute makes no provision for bringing in such parties to such proceeding in the Probate Court.

Id.—EXCEPTIONS. The mode of taking exceptions in civil cases applies to probate proceedings. (1713, C. C. P.)

Appeal from Probate Court, San Francisco.

Seeber, and Lloyd & Wood, for appellant.

E. A. Lawrence, for respondent.

By the COURT:

This is an application by petitioner to the Probate Court of the city and county of San Francisco under Chapter IX of the Code of Civil Procedure, which treats "of the conveyance of real estate by executors and administrators in certain cases," and the appeal is taken from the order directing the conveyance asked for in the petition.

The order is appealable. (C. C. P., Sec. 969, Subdivision 5.)

The conveyance there mentioned is not as contended by respondent, a conveyance on sale and partition. The section referred to, in our opinion, authorizes the appeal.

There is a sufficient undertaking on appeal (C. C. P., Sec. 970), and the matters are properly brought before us by bill of exceptions. (C. C. P., Secs. 1713, 646 to 658, 670.)

The petition of respondent shows, among other matters, that the administrator of Corwin, who is proceeded against, before the petition was filed had made a lawful conveyance to one E. J. Baldwin, whereby the title (referring to the title to the real estate for which a conveyance is sought by the proceeding), has passed to Baldwin.

Baldwin is not a party to the proceeding, and could not have been made a party to it in the Probate Court. The

statute makes no provision for making him a party. Under these circumstances the petitioner was not entitled to a decree.

The proceeding is one for a specific performance of a contract in the Probate Court. It is so spoken of in C. C. P., Sec. 1602.

Under such circumstances a Court of equity would not decree a specific performance. Before proceeding to a decree such Court is always careful to have all parties before it who have a right to be heard, as did Baldwin here, so that full and complete justice might be done. It was not the intention of the statute to vest in the Probate Court more extensive power than was administered by a Court of equity. This view is sustained by Sec. 1602 of the chapter of the Code of Civil Procedure above referred to.

The order is reversed and the cause remanded with directions to dismiss the petition without prejudice, under the section last referred to.

DEPARTMENT No. 2.

[Filed August 22, 1882.]

No. 8284.

TRANTER, APPELLANT, vs. SACRAMENTO, RESPONDENT.

LIABILITIES OF CITIES—INJURIES—SIDEWALK—DAMAGES. Action to recover damages for injuries received by falling through a defective sidewalk in the city of Sacramento. *Held*, the judgment for defendant, on demurrer to the complaint, was properly rendered, on authority of *Winbigler vs. Los Angeles*, 45 Cal. 36; the latter case holding that incorporated cities are not liable for injuries sustained by individuals, caused by the neglect of the city officers in keeping the streets in repair, unless made so liable by the Acts under which they are incorporated.

Appeal from Superior Court, Sacramento County.

Johnson and Taylor, for appellant.

W. A. Anderson, for respondent.

By the COURT:

We do not think that this case is distinguishable in principle from *Winbigler vs. Los Angeles*, 45 Cal. 36; and on the authority of that case the judgment in this case must be affirmed.

Judgment affirmed.

IN BANK.

[Filed August 21, 1882.]

No. 10,748.

PEOPLE, RESPONDENT, vs. KENN, APPELLANT.

CRIMINAL LAW—EVIDENCE—TESTIMONY—HOMICIDE. A witness for the prosecution, who had testified that she lived next door to the house where defendant and deceased had lived together as husband and wife until the time of the homicide, was asked: "About a month before her death did deceased come to your house and stay all night, and if so, state why she came there, and under what circumstances?" Objection was made by defendant's counsel that the question was irrelevant, incompetent, and immaterial; but upon the District Attorney stating to the Court that the object of the question was to show the acts and words of the defendant on the occasion referred to in the question, and not elicit any statement or declaration of the deceased, the objection was overruled, and the witness answered: "The deceased came to my house between one and two o'clock in the morning, greatly excited, and stayed all night. When she came, I heard the defendant swearing, and breaking the doors, windows, and things in his own house. This was going on for some time." Motion was then made to strike out the answer on the ground of irrelevancy, which was likewise denied. *Held*, exceptions to these rulings were not well taken.

Id.—Id. The conduct of defendant towards the woman with whom he had lived as his wife and for whose murder he was on trial, was not irrelevant. Resulting as it seems to have done, at times in quarrels and alienations between them of such a character as to drive the woman from her house, they were in themselves circumstances, in connection with the circumstances of the homicide, for the consideration of the jury. They tended to show the state of the defendant's feelings towards the woman and his treatment of her, and, in some degree, to show a motive for taking her life.

Id.—Id. Where acts or words of a defendant in a criminal case tend in any degree to establish any fact in a series tending to the fact in dispute, they are not subject to the objection of irrelevancy.

Appeal from Superior Court, San Francisco.

C. H. Wolff, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

During the examination in chief of a witness for the prosecution, who had testified that she lived next door to the house where defendant and deceased had lived together as husband and wife until the time of the homicide, the following question was propounded to the witness by the District Attorney; "About a month before her death did deceased come to your house and stay all night, and if so, state why she came there, and under what circumstances?" Objection

was made by defendant's counsel that the question was irrelevant, incompetent and immaterial; but upon the District Attorney stating to the Court that the object of the question was to show the acts and words of the defendant on the occasion referred to in the question, and not elicit any statement or declaration of the deceased, the objection was overruled, and the witness answered: "The deceased came to my house between one and two o'clock in the morning, greatly excited, and stayed all night. When she came, I heard the defendant swearing, and breaking the doors, windows and things in his own house. * * * This was going on for some time," etc. Motion was then made to strike out the answer on the same ground of irrelevancy, which was likewise denied. We think exceptions to these rulings were not well taken.

The conduct of defendant towards the woman with whom he had lived as his wife and for whose murder he was on trial, was not irrelevant. Resulting as it seems to have done, at times, in quarrels and alienations between them of such a character as to drive the woman from her house, they were in themselves circumstances, in connection with the circumstances of the homicide, for the consideration of the jury. They tended to show the state of the defendant's feelings towards the woman and his treatment of her, and, in some degree, to show a motive for taking her life. (*Hinds vs. The State*, 55 Ala. 145; *Murphy vs. The People*, 63 N. Y. 590; *Reg vs. Edwards*, 12 Cox's Crim. Cases, 230.)

Where acts or words of a defendant in a criminal case tend in any degree to establish any fact in a series tending to the fact in dispute, they are not subject to the objection of irrelevancy.

Judgment and order affirmed.

We concur: Myrick, J., McKinstry, J., Thornton, J., Morrison, C. J., Ross, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 8313.

LAPHAM, APPELLANT, vs. CAMPBELL, RESPONDENT.

EQUITY—FRAUD—JUDGMENT—MOTION—REMEDY. *Per McKee, J.*: Proceeding in equity for relief against a judgment obtained by fraud. In January, 1880, judgment by default was entered in the Superior Court of Placer County, upon an affidavit of proof of service, made by a

person qualified in law to serve process. The affidavit showed that service had been made upon the defendant in the action, by delivery to him personally, on the 18th of November, 1879, of a copy of the summons and complaint, at Hot Springs, in Placer County, California. The complaint herein admitted that the judgment was fair and regular on its face, but alleged that it was obtained upon a false cause of action and upon false proof of a service of process in the case, which the then plaintiff fraudulently procured to be made on the defendant, who, at the time of the alleged service, was a citizen of the State of Nevada, and not subject to process issued out of the Courts of California. *Held*, independent of Sec. 473, C. O. P., a Court of record may, by virtue of its inherent power over its own records, so long as it has physical control of the same, set aside, on motion or otherwise, a judgment procured by fraud; or such a judgment may be set aside by an original action in a Court of equity, when by reason of the fraud, the Court that rendered the judgment had not acquired jurisdiction of the person of the defendant.

- Id.—Id.** Before the Codes the rule was that a decree gained by fraud might be set aside by petition, and a judgment at law by motion; and *a fortiori* might such decree or judgment be set aside by bill.
- Id.—Id.** If a party has been deprived of his rights by a fraud, which was unknown to him at the time it was perpetrated, and for not knowing which he is not chargeable with negligence, and he has no remedy at law, a Court of equity will grant him relief by an original action. If no laches, or want of diligence is imputable to a party, there is nothing in reason or propriety preventing the interference of equity.
- Id.—Id.** As against the judgment under consideration, the *then* defendant had no available remedy at law by motion under the Code. For as he was, according to the allegations of the complaint, a citizen of the State of Nevada and beyond the territorial jurisdiction of the Courts of California, at the time of the alleged service of process, the Court that rendered the judgment had no jurisdiction over his person; and the fact is alleged that he had no knowledge that the judgment had in fact been taken against him, upon a false affidavit of service of process upon him, in the State of California, until more than six months after the rendition of the judgment.
- Id.—Id.** Where judgment is taken without due process of law, or upon false proof of service of process upon a defendant who was, at the time of the alleged service, beyond the territorial jurisdiction of the Court, he is not chargeable with knowledge of the rendition of the judgment. No one is called to act in a judicial proceeding in which jurisdiction over his person has not been obtained. And although he be a party named in the proceeding, yet if jurisdiction over him be not obtained, he has no duty to perform in relation to the proceeding, for the non-performance of which he is chargeable with mistake, inadvertence, surprise, or excusable neglect; and, as he is not chargeable with any of those things, he is not called upon to avail himself of any of them as ground for a motion to set aside the judgment; nor is he chargeable with laches or want of diligence for not knowing of the proceedings or judgment.
- Id.—Id.** The party procuring a judgment against another without due process of law, or by fraud, takes it at his peril, and the party against whom it is taken is not bound to apply, within a year after its rendition, to set it aside and be allowed to answer the complaint, for, as he was beyond the territorial jurisdiction of the Court, and never had been served with process at all, he is not bound to voluntarily submit himself to a foreign jurisdiction.
- Id.—Id.** Nor was the defendant bound to resort to the remedy by motion to set aside a judgment taken against him in an action in which there

was no service of summons upon him, or in which the affidavit of service of summons was false.

Id.—Id. Instead of waiting to be sued on such judgment in his own State, a party may come into the Courts of this State and obtain relief against such a judgment by original action.

Myrick, J., and McKinstry, J., concurring: The case presented by the plaintiff in his complaint shows that there was no service of summons in the action referred to—on the contrary, a false affidavit of service was made and filed, and upon such false affidavit the judgment was rendered. Assuming that under Section 473, O. C. P., the defendant in that action (plaintiff here) could have obtained relief if he had applied within six months, it is enough to say that he states sufficient reasons why the application was not made within the time. The case stated in the complaint is clearly within the rules governing Courts of equity in such cases, and the demurrer to the complaint should have been overruled.

Appeal from Superior Court, Placer County.

J. M. Fulweiler, for appellant.

W. H. Bullock, for respondent.

McKEE, J., delivered the opinion of the Court:

A demurrer to the complaint in the action out of which this case arises, having been sustained by the Court, the plaintiff declined to amend, and final judgment was entered against him, from which he appealed.

The case itself is a proceeding in equity for relief against a judgment alleged to have been obtained by fraud.

From the facts averred in the complaint, it appears that in the month of January, 1880, judgment by default was entered in the Superior Court of Placer County, upon an affidavit of proof of service, made by a person qualified in law to serve process. The affidavit showed that service had been made upon the defendant in the action, by delivery to him personally, on the 18th of November, 1879, of a copy of the summons and complaint, at Hot Springs, in Placer County, California.

This proof was sufficient to give the Court jurisdiction over the person of the defendant; and as it had jurisdiction of the subject-matter of the action, the judgment rendered in the case was not void nor voidable. The pleader admits that it is fair and regular on its face, but he alleges that it was obtained upon a false cause of action and upon false proof of a service of process in the case, which the plaintiff fraudulently procured to be made on the defendant, who, at the time of the alleged service, was a citizen of the State of Nevada, and not subject to process issued out of the Courts of California.

In the presence of the demurrer these averments must be

taken as true; and they, in connection with the other allegations contained in the complaint, constitute a cause of action, unless, as it is contended, the remedy for relief is not by an original action in equity, but is, exclusively, by motion, in the Court in which the judgment was rendered, to vacate and set aside the judgment.

The Code has provided that remedy for relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect (Sec. 473, C. C. P.); or when taken in a case where summons has not been personally served on a defendant. In the first class of cases the remedy must be availed of within six months, and in the second, within a year, after the rendition of judgment. But, independent of the provision of the Code, I think that a Court of record may, by virtue of its inherent power over its own records, so long as it has physical control of the same, set aside, on motion or otherwise, a judgment procured by fraud; or such a judgment may be set aside by an original action in a Court of equity, when by reason of the fraud, the Court that rendered the judgment had not acquired jurisdiction of the person of the defendant. Truth, it is said, must be the basis of all judgments; and no Court will knowingly allow itself to be abused.

Before the Codes the rule was that a decree gained by fraud might be set aside by petition, and a judgment at law by motion; and *a fortiori* might such decree or judgment be set aside by bill. (*Sheldon vs. Fortescue*, 3 Peere Wms. 111; *Richmond vs. Taylor*, 8 Id. 75; *Loyd vs. Mansel*, 2 Id. 73.)

But it is urged that while the remedy by motion exists, and is available, the existence of a Court of equity cannot be invoked; nor can it be, after the right to the remedy has gone, by the expiration of the statutory time within which to avail of it, unless the party is not chargeable with negligence.

This contention is made upon the principle that where a party has an adequate remedy at law he is not entitled to the assistance of a Court of equity. But the converse of the proposition is also true, viz., that if a party has been deprived of his rights by a fraud, which was unknown to him at the time it was perpetrated, and for not knowing which he is not chargeable with negligence, and he has no remedy at law, a Court of equity will grant him relief by an original action. If no laches, or want of diligence is imputable to a party, there is, says the Supreme Court in *Biband vs. Kreutz*, 40 Cal. 114, nothing in reason or propriety preventing the interference of equity.

Now, as against the judgment under consideration, the *then* defendant had no available remedy at law by motion under the Code. For as he was, according to the allegations of the complaint, a citizen of the State of Nevada and beyond the territorial jurisdiction of the Courts of California, at the time of the alleged service of process, the Court that rendered the judgment had no jurisdiction over his person, and the fact is alleged that he had no knowledge that the judgment had been in fact taken against him, upon a false affidavit of service of process upon him, in the State of California, until more than six months after the rendition of the judgment.

Where judgment is taken without due process of law, or upon false proof of service of process upon a defendant who was, at the time of the alleged service, beyond the territorial jurisdiction of the Court, he is not chargeable with knowledge of the rendition of the judgment. No one is called to act in a judicial proceeding in which jurisdiction over his person has not been obtained. And although he be a party named in the proceeding, yet if jurisdiction over him be not obtained, he has no duty to perform in relation to the proceeding, for the non-performance of which he is chargeable with mistake, inadvertence, surprise, or excusable neglect, and, as he is not chargeable with any of those things, he is not called upon to avail himself of any of them as ground for a motion to set aside the judgment; nor is he chargeable with *laches* or want of diligence for not knowing of the proceedings or judgment. The party procuring a judgment against another without due process of law, or by fraud, takes it at his peril, and the party against whom it is taken is not bound to apply, within a year after its rendition, to set it aside and be allowed to answer the complaint, for, as he was beyond the territorial jurisdiction of the Court, and never had been served with process at all, he is not bound to voluntarily submit himself to a foreign jurisdiction. That portion of Section 473, *supra*, relates to persons who are within the territorial jurisdiction of the Courts of the State, and not to those who are beyond the jurisdiction. Nor was the defendant bound to resort to the remedy by motion to set aside a judgment taken against him in an action in which there was no service of summons upon him, or in which the affidavit of summons was false.

If as a citizen of the State of Nevada he had been sued in any of the Nevada Courts on the judgment, there is no doubt that he could have defended the action by showing that he had not been served with process. This he would have been

entitled to show, notwithstanding the record of the judgment showed that he had been served. If it clearly appeared that the Superior Court of Placer County had acquired no jurisdiction over him, then, as a foreign judgment, its recitals would have been worthless against him. (*Gleason vs. Dodd*, 4 Met. 333; *Shelton vs. Tiffin*, 6 How. U. S. 163.) And, instead of waiting to be sued on the judgment in his own State, a party may come into the Courts of this State and obtain relief against such a judgment by original action.

Judgment reversed with direction to the Court below to overrule the demurrer and permit the defendant to answer.

CONCURRING OPINION.

We concur in the judgment. The case presented by the plaintiff in his complaint shows that there was no service of summons in the action referred to; on the contrary, a false affidavit of service was made and filed, and upon such false affidavit the judgment was rendered. Assuming that under Section 473, Code of Civil Procedure, the defendant in that action (plaintiff here) could have obtained relief if he had applied within six months, it is enough to say that he states sufficient reasons why the application was not made within the time. The case stated in the complaint is clearly within the rules governing Courts of equity in such cases, and the demurrer to the complaint should have been overruled.

MYRICK, J., McKINSTRY, J.

IN BANK.

[Filed August 21, 1882.]

No. 10,692.

PEOPLE, RESPONDENT, VS. MESSERSMITH, APPELLANT.

INSANITY—HOMICIDE—BURDEN OF PROOF—INSTRUCTION. An instruction in a homicide case that "the burden of proving the existence of insanity rests upon the accused, and it follows that this fact must be satisfactorily established, and that by a preponderance of evidence," is substantially correct.

1b.—1b. "Preponderance of evidence" is the equivalent of "satisfactory proof."

1b. Where a person accused of crime relies on the defense of insanity, he is bound to establish it by such a preponderance of evidence that if the question were submitted to the jury in a civil case they would find him insane.

1b. The Court also instructed the jury that "a tendency to commit suicide does not prove insanity, but it is one of the symptoms of insanity which it is entirely competent for the jury to take into con-

sideration with all the other symptoms which have been proved, and with all the facts and circumstances of the case." *Held*, where a Court unqualifiedly tells a jury as matter of law that an assumed fact does not prove a fact in dispute, it is error. Such a charge should not be given when it is necessary to draw an inference of fact. An inference of fact, where it does not arise as a presumption of law, must be drawn by the jury, whose duty it is to pass upon the sufficiency or insufficiency of evidence. So when the Court below, in the first part of its instruction, told the jury as matter of law that the fact which was the subject-matter of the instruction, did not prove the fact in dispute, i. e., the insanity of the defendant, it invaded the province of the jury. It, however, withdrew from that position by immediately telling them that as a fact it was a matter for their consideration, in connection with all the other facts and circumstances in the case. Thus qualified, the fact was properly left as partial evidence of the fact in dispute to the determination of the jury; and there was no error in the instruction as an entirety to the prejudice of the defendant.

Id.—Id. An instruction, otherwise unobjectionable, is not erroneous if the fact which is assumed in it was one not controverted by the evidence. It is not error for a Court to assume the existence of an admitted or uncontroverted fact in a case, and instruct the jury as to its legal effect.

Id.—Id. As the point whether the fact assumed was controverted or uncontroverted by the evidence did not affirmatively appear, as the evidence was not in the record, it would be presumed that it was an uncontroverted or admitted fact in the case, and therefore not error to assume its existence.

Id.—Id. As to the other instruction called in question, *held*, while it is not by any means couched in such clear and unequivocal terms as should characterize a legal charge to a jury, in the performance of a solemn duty, it must be construed as declaring that it was the duty of the jury to determine from the evidence, whether defendant committed the homicidal act under, or in the absence of "such motives as would naturally influence the mind of a depraved man to acts of violence;" and that if the defendant committed the act with his mind under the influence of "motives of anger, jealousy, or hate, that circumstance would add great strength to the proof of his insanity." But if actual insanity at the time of the act was not made out to their minds by the testimony, and they believed, from the evidence that the defendant was "actuated by strong motives of revenge or other passions, they had the right to infer that it was under the influence of those motives that he committed the deed and not under the influence of insanity, unless they were satisfied by the evidence that he was insane."

So construed, the instruction where it verges on error was favorable to the defendant.

Appeal from Superior Court, San Francisco.

C. H. Wolff, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

On this appeal it is contended, on behalf of the appellant, that he has not had a fair and impartial trial, because of errors of law committed by the Court below in the charge

to the jury. Three instructions given to the jury are challenged: By one of them the jury were told, "That a tendency to commit suicide does not prove insanity, but it is one of the symptoms of insanity which it is entirely competent for the jury to take into consideration with all the other symptoms which have been proved, and with all the facts and circumstances of the case;" and by another, "That the burden of proving the existence of insanity rests upon the accused, and it follows that this fact must be satisfactorily established, and that by a preponderance of evidence." The last instruction contains no erroneous proposition of law. It has been repeatedly held that where a person accused of crime relies on the defense of insanity, he is bound to establish it by such a preponderance of evidence that if the question were submitted to the jury in a civil case they would find him insane. (*People vs. Coffman*, 24 Cal. 230; *People vs. McDonell*, 47 Id. 134; *People vs. Wilson*, 49 Id. 13; *People vs. Walker*, N. Y., Feb., 1882; *People vs. Ferris*, 55 Id. 588.) In other words, insanity, like any other affirmative defense, relied on by a defendant in a criminal case, must be proved to the satisfaction of the jury. It is a fact; and a fact proven by a preponderance of evidence is a fact "satisfactorily established." As an expression, a preponderance of evidence is the equivalent of satisfactory proof. While, therefore, the instruction under consideration may be faulty in phraseology, it is, as a legal proposition, substantially correct.

The basis of the first instruction consists of a single fact, i. e., a tendency to commit suicide. As a fact in the case it was assumed by the Court. In making the assumption it is contended that the Court invaded the province of the jury, and that the instruction is erroneous.

It is error for a Court to assume the existence of a fact which is not in evidence or which is to be determined by the jury on evidence, however slight, or on a conflict of evidence. A Court cannot weigh evidence and determine its sufficiency as matter of law. The jury are the exclusive judges of the credibility of witnesses, the weight of testimony and of the facts established, and the presumptions of facts deductable from them. Any assumption of a fact or facts in dispute which must be found by the jury, is, therefore, an infringement of their province, which, presumptively, injuriously affects the rights of the accused and constitutes error for which a conviction is reversible. (*People vs. Ybarri*, 17 Cal. 166; *People vs. Walden*, 51 Id. 588; *People vs. Wong Ah Ngow*, 54 Id. 151.)

An instruction, however otherwise unobjectionable, is not erroneous if the fact which is assumed in it was one controverted by the evidence. Is is not error for a Court to assume the existence of an admitted or uncontroverted fact in a case, and instruct the jury as to its legal effect. (*Luman vs. Kerr*, 4 Green, Iowa, 159; *Hughes vs. Marty*, 24 Iowa, 499.) Whether the fact assumed was controverted or uncontroverted by the evidence does not affirmatively appear by the record, for the evidence is not in the record. We must therefore presume that it was an uncontroverted or admitted fact in the case, and it was not error to assume its existence.

But where a Court unqualifiedly tells a jury as matter of law that an assumed fact does not prove a fact in dispute, it is error. Such a charge should not be given when it is necessary to draw an inference of fact. An inference of fact, where it does not arise as a presumption of law, must be drawn by the jury, whose duty it is to pass upon the sufficiency or insufficiency of evidence. So when the Court below, in the first part of its instruction, told the jury as matter of law that the fact which was the subject-matter of the instruction, did not prove the fact in dispute, i. e., the insanity of the defendant, it invaded the province of the jury. It, however, withdrew from that position by immediately telling them that as a fact it was a matter for their consideration in connection with all the other facts and circumstances in the case. Thus qualified, the fact was properly left as partial evidence of the fact in dispute to the determination of the jury; and there was no error in the instruction as an entirety to the prejudice of the defendant.

As to the other instruction which has been called in question, while it is not, by any means couched in such clear and unequivocal terms as should characterize a legal charge to a jury, in the performance of a solemn duty, it must be construed as declaring, that it was the duty of the jury to determine, from the evidence, whether the defendant committed the homicidal act under, or in the absence of "such motives as would naturally influence the mind of a depraved man to acts of violence;" and that if the defendant committed the act with his mind under the influence of "motives of anger, jealousy, or hate, that circumstance would add great strength to the proof of his insanity." But if actual insanity at the time of the act was not made out to their minds by the testimony, and they believed from the evidence that the defendant was "actuated by strong motives of revenge or other passions, they had the right to infer that

it was under the influence of those motives that he committed the deed and not under the influence of insanity, unless they were satisfied by the evidence that he was insane."

So construed, the instruction where it verges on error was favorable to the defendant.

Judgment and order affirmed.

We concur: Myrick, J., Morrison, C. J.

I concur in the judgment: Ross, J.

IN BANK.

[Filed August 22, 1882.]

No. 8420.

COUNTY OF SACRAMENTO, APPELLANT,

vs.

CENTRAL PACIFIC RAILROAD CO., RESPONDENT.

ATTORNEY-GENERAL—TAXES—ACTION—APPEAL—REVENUE—STATE—APPEARANCE. The Attorney-General, as the law officer of the State, has a right to be heard in a case involving the revenue of the State.

Appeal from the Superior Court, Sacramento County.

Attorney-General Hart, for appellant.

McFarland and Haymond, for respondent.

By the COURT:

The plaintiff commenced an action against the defendant to recover State and county taxes for the year 1881, to the amount of \$17,425—of which sum \$10,711.25 was for county taxes, and \$6,713.75 was for State taxes. The defendant filed an offer in writing to allow plaintiff to take judgment for \$9,374.87, which offer was accepted, and judgment was rendered accordingly. This acceptance was made by the District Attorney of Sacramento County, with the consent and approbation of the Board of Supervisors. The Attorney-General, on behalf of the State, moved to set aside the judgment as not authorized by any law, and to strike from the files the acceptance of the offer for judgment. The Court below denied the motion, and from the order denying the motion the Attorney-General gave notice of appeal. The defendant moves in this Court to dismiss the appeal, upon the ground that the Attorney-General had no right to be heard in the Court below, and no authority to institute an appeal.

The motion is denied. The Attorney-General, as the law officer of the State, has a right to be heard in a case involving the revenue of the State.

DEPARTMENT No. 2.

[Filed August 22, 1882.]

No. 8290.

HECHT ET AL., APPELLANTS,

VS.

GREEN ET AL., RESPONDENTS.

ASSIGNMENT—INSOLVENCY. Plaintiffs were judgment creditors of B. & E., and caused an execution to be levied upon their property—defendants being garnishees. Defendants denied indebtedness to B. & E., and hence the action. *Held*, a nonsuit was properly granted. The evidence introduced by the plaintiffs did not tend to prove anything beyond the fact that the defendants had possession of the property of B. & E. by virtue of an assignment made by them for the benefit of their creditors. Having proved so much it was incumbent on the plaintiffs to impeach that assignment before asking the Court to disregard it. The Court had no right to assume that it was not a valid assignment.

ID.—ID. The provisions of the Civil Code relative to assignments for the benefit of creditors were not repealed by the "Act for the relief of insolvent debtors," approved April 16, 1880.

Appeal from Superior Court, Butte County.

Turner, and Freeman and Bates, for appellants.

Long, and Reardan and Freer, for respondents.

By the COURT:

The motion for nonsuit was properly granted. The evidence introduced by plaintiffs did not tend to prove anything beyond the fact that defendants had possession of the property of Boyles & Evans by virtue of an assignment made by them for the benefit of their creditors. Having proved so much, it was incumbent on the plaintiffs to impeach that assignment, before asking the Court to disregard it. The Court had no right to assume that it was not a valid assignment.

We do not think that the provisions of the Civil Code relative to assignments for the benefit of creditors were repealed by the "Act for the relief of insolvent debtors," approved April 16, 1880.

Judgment affirmed.

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NO. 2.

Supreme Court of California.

IN BANK.

[Filed August 24, 1882.]

No. 8545.

STAUDE, PETITIONER,

VS.

THE BOARD OF ELECTION COMMISSIONERS OF
THE CITY AND COUNTY OF SAN FRANCISCO,
RESPONDENT.

ELECTION—SAN FRANCISCO—"HARTSON ACT"—"CONSOLIDATION ACT"—MUNICIPALITIES—CONSTITUTION. (*Per Ross, J., Thornton, J., and Morrison, C. J., concurring.*) By virtue of the Act of the Legislature approved March 7, 1881, and commonly known as the "Hartson Act," an election of the elective officers of the city and county of San Francisco is required to be held at the general election to occur in November of the present year.

ID.—ID. The Consolidation Act of that city and county, which provides that the elections therein shall be held in the odd-numbered years, is affected by the provisions of the Hartson Act.

ID.—ID. Section 6 of Article XI of the Constitution providing that: "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed," is prospective.

While the framers of the Constitution gave to all cities and towns and cities and counties, the right to organize under a general Act of incorporation which the Legislature was directed to pass, or to continue their existence under their existing charters, as they might elect, they nevertheless said that whichever course should be pursued, such cities and towns and cities and counties should be subject to and controlled by general laws—such general laws as should be passed by the Legislature other than those for the "incorporation, organization, and classification" of cities and towns. The Constitution has provided in effect that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want, and, further, that its charter shall not be changed by special legislation,

directly nor indirectly, under the guise of laws relating to cities, or cities and counties, containing a population of more than one hundred thousand inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the State, the Constitution has said in effect that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject to and controlled by such general laws as the Legislature shall enact other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns. Such a law is the Harston Act, which simply provides for a uniform system of elections for the elective county, city and county, and township officers in the State on the even-numbered years, commencing in the year 1882.

- Id.—Id.—CHIEF OF POLICE—POLICE COMMISSIONERS. With respect to the offices of Police Commissioners and Chief of Police, the doctrine of the case of *People vs. Provines*, 34 Cal. 520, establishes the validity of the Act of the Legislature approved April 1, 1878.
- Id.—Id. The objection urged to the Act that the judicial officers of the State could not be charged with the duties or powers prescribed, because of the third article of the then existing Constitution is answered by *Provines' case*.
- Id.—Id. The departments of which the Constitution speaks, and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the Departments of the State Government, as expressly defined and limited in the Constitution; and its meaning is that no member of the Legislative Department as there defined, shall at the same time be a member of the Executive or Judicial Departments, as there defined, and *vice versa*.
- Id.—Id. The article of Constitution means that the powers of the State Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments, "except in the cases hereinafter expressed directly or permitted."
- Id.—JUDICIAL NOTICE. Judicial notice will be taken that San Francisco is the only "city and county" within the State.
- Id.—Id. (*Per Myrick, J., concurring.*) By the Constitution all elections for all persons to be elected to office by the people are to be held in November of the even-numbered years, and the terms of office are to commence in January following; this is the uniform rule throughout the State, including the city and county of San Francisco; in regard to elections as well as in regard to some other matters (*McDonald vs. Patterson*, 54 Cal. 245), the Consolidation Act of the city and county is to give place to the general rule prescribed. (*McKee, J., concurred in the judgment.*)
- Id.—Id. (*Per Sharpstein, J., dissenting.*) The "Harston Act" neither amends nor repeals that clause of the Act of incorporation of the city and county of San Francisco which fixes the times of holding elections for the election of officers of said city and county.
1. Because it does not purport to amend or repeal any provision of said Act of incorporation, but on the contrary, purports to be an amendment of a section of the Political Code which has no reference whatever to said municipal corporation. And "it is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special Acts passed for the benefit of particular municipalities."
 2. The Political Code expressly declares that nothing in it affects any Act consolidating cities and counties, or Acts amending or supplementing such Acts. And it is a well settled rule of construction that an amendment to a law is to be construed as to matters arising after its passage

precisely as it would be had it originally formed a part of the Act amended. If the section of the Code which is amended by the Hartson Act had read before such amendment as it now reads, it would not apply to the city and county of San Francisco.

Id.—*Id.* When the Constitution declares that cities organized before its adoption shall be subject to and controlled by general laws, it means as to matters not specially provided in charters which existed at the date of the adoption of the Constitution. (*McKinstry, J.*, concurred with *Sharpstein, J.*)

Baggett, and *Quint*, for petitioner.

Newlands, *McClure & Dwinelle* and *Burnett*, for respondent.

Clarke and *Hammond*, for Police Commissioners.

Carter, contra.

Ross, J., delivered the opinion of the Court:

The question in this case is whether, by virtue of the Act of the Legislature approved March 7, 1881, and commonly known as the "Hartson Act," an election of the elective officers of the city and county of San Francisco is required to be held at the general election to occur in November of the present year.

That the Legislature intended the provisions of the Act to apply to San Francisco is not denied. Indeed, it could not be successfully denied, for it provides in terms for the election of all elective county, city and county, and township officers, with certain enumerated exceptions; and we know, judicially, that San Francisco is the only "city and county" within the State. The position of the respondents, however, is that the Consolidation Act of that city and county, which provides that the elections therein shall be held in the odd-numbered years, is unaffected by the provisions of the Act in question. And this, it is said, because of the provisions of the Constitution. By Section 6 of Article XI of that instrument it is provided that "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed." This provision is clearly prospective. But the framers of the Constitution, recognizing the fact that there were municipal corporations already in existence, provided in the same section as follows: "Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." And by the succeeding section the provisions of the Constitution applicable to cities, and,

also those applicable to counties, so far as not inconsistent or not prohibited to cities, are made applicable to consolidated city and county governments. If, therefore, the Legislature has, by general law, provided for the incorporation, organization, and classification, in proportion to population, of cities and towns, or, if not, whenever it shall do so, the city and county of San Francisco may become organized under such general law whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. And until a majority of such electors do so determine, the Consolidation Act of the city and county cannot be vacated or abrogated by any general Act of incorporation. (*Desmond vs. Dunn*, 55 Cal. 242.) But whether the city and county of San Francisco elects to organize under such general laws or to continue its existence under the Consolidation Act, it is subject to and controlled by general laws; for in the same section of the Constitution, in which the then existing city and town organizations are recognized, and the continuance of their existing charters permitted, it is declared that "*cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted, by authority of this Constitution, shall be subject to and controlled by general laws.*"

The framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold that they did not mean what they said. Giving, as they did, to all cities and towns and cities and counties, the right to organize under a general act of incorporation, which the Legislature was directed to pass, or to continue their existence under their existing charters, as they might elect, they nevertheless said that whichever course should be pursued, such cities and towns and cities and counties should be subject to and controlled by general laws—such general laws as should be passed by the Legislature other than those for the "incorporation, organization, and classification" of cities and towns. The Constitution has provided in effect that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want, and, further, that its charter shall not be changed by special legislation, directly nor indirectly, under the guise of laws relating to cities or cities and counties containing a population of more than one hundred thousand inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the State, the Constitution has said in effect that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject

to and controlled by such general laws as the Legislature shall enact other than those for the incorporation, organization, and classification, in proportion to population of cities and towns. We do not perceive the danger suggested by counsel for respondents, of the Consolidation Act being "eaten away" by such legislation. It cannot, as already observed, be supplanted by a general act of incorporation without the will of the people expressed at the polls, nor can it be affected by special legislation; and it is not probable that such *general* laws as the Legislature may enact in conflict with its provisions, will seriously affect it. But be that as it may, the Constitution has expressly declared that it shall be subject to and controlled by such laws. Such a law, in our opinion, is the Hartson Act, which simply provides for a uniform system of elections for the elective county, city and county, and township officers in the State on the even-numbered years, commencing in the year 1882.

It is unnecessary here to speak of the further provision contained in Section 8 of Article XI, giving to any city containing a population of more than one hundred thousand inhabitants authority to frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a Board of fifteen freeholders to be elected to prepare and propose a charter, etc.

With respect to the offices of Police Commissioners and Chief of Police, we are of opinion that the doctrine of the case of *People vs. Provines*, 34 Cal. 520, establishes the validity of the Act of the Legislature approved April 1, 1878. By that Act the Judges of the late Fifteenth, Twelfth, and Fourth Judicial Districts of the State were empowered and required to meet and choose three citizens of the city and county of San Francisco, householders in good repute, without respect to their politics, who, together with the Chief of Police, were constituted the Board of Police Commissioners for said city and county. The Act prescribed the powers and duties of the Board, and further provided that from and after the official term of the then Chief of Police his office should "cease to be elective, and shall be filled by the Commissioners, whose appointment is herein provided for."

The objection urged to the Act, is that the judicial officers of the State could not be charged with the duties or powers prescribed, because of the Third Article of the then existing Constitution, which was in these words: "The powers of the Government of the State of California shall be divided into three separate departments—the Legislative, the Execu-

tive, and Judicial—and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted."

In *People vs. Provines*, the Court reviewed all of the cases in this Court in which this article of the Constitution was under consideration, from and including Burgoyne's case in the fifth, to and including Sanderson's in the thirtieth of California Reports "for the double purpose," as expressed by the Court "of ascertaining precisely what has been said in relation to the present question, and of stating our conclusions in relation to the soundness of each case, in order that there may be, hereafter, no doubt as to which are to be regarded as law, and which not." And the conclusion of the Court in *Provines' case* was that the departments of which the Constitution speaks, "and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the departments of the State Government, as expressly defined and limited in the Constitution; and its meaning is that no member of the Legislative Department as there defined, shall, at the same time, be a member of the Executive or Judicial Departments, as there defined, and *vice versa*. That is to say, no judicial officer shall be Governor, Lieutenant-Governor, Secretary of State, Controller, Treasurer, Attorney-General, or Surveyor-General, all of whom and none others, in the sense of the Third Article of the Constitution, belong to and constitute the Executive Department of the Government; or a member of the Senate or Assembly, which two bodies and none other, in the sense of the Third Article of the Constitution, constitute the Legislative Department. So of each officer of the Executive Department—he cannot belong to the Judicial or Legislative Department. That is to say, he can hold no judicial office, nor the office of Senator or member of the Assembly. And so of Senators and members of the Assembly—they can hold no judicial or executive offices comprised within the Executive and Judicial Departments, as defined in Articles V and VI. In short, the third article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments, 'except in the cases hereinafter expressed directly or permitted.'"

As thus expounded, it is obvious that the powers conferred and duties imposed on the District Judges by the Act of April 1, 1878, did not come within the constitutional inhibition.

This exposition of the Constitution by the highest Court in existence under it, and acted on by the Legislature, should be accepted by us in regard to laws so passed, without regard to our own views in respect to the correctness or incorrectness of the doctrine.

It results that the Police Commissioners and Chief of Police are not elective officers.

Demurrer overruled.

We concur: Thornton, J., Morrison, C. J.

I concur in the judgment: McKee, J.

CONCURRING OPINION.

In dissenting from the judgments of the Court in *Barton vs. Kalloch*, 56 Cal. 95, and *Wood vs. Election Commissioners*, June 15, 1881, and in concurring in the judgment in *Treadwell vs. Supervisors*, August 19, 1881, I had occasion to express my views as to the force and effect of the Constitution of 1879 in controlling elections and terms of office throughout the State. I see no reason for changing the views then expressed. I thought then, and I think now, that by the Constitution all elections for all persons to be elected to office by the people are to be held in November of the even-numbered years, and that the terms of office are to commence in January following; that this is the uniform rule throughout the State, including the city and county of San Francisco; and that in regard to elections, as well as in regard to some other matters (*McDonald vs. Patterson*, 54 Cal. 245), the Consolidation Act of the city and county is to give place to the general rule prescribed. I therefore concur in the judgment.

MYRICK, J.

DISSENTING OPINION.

I dissent. I think, for reasons set forth in the opinions which I delivered in *Desmond vs. Dunn* and *Wood vs. Election Commissioners*, and in the dissenting opinion of Mr. Justice McKinstry in *Donahue vs. Graham*, that the Act commonly known as "the Hartson Act" neither amends nor repeals that of the Act of incorporation of the city and county of San Francisco, which fixes the times of holding elections for the election of officers of said city and county.

1. Because it does not purport to amend or repeal any provisions of said Act of incorporation, but on the contrary,

purports to be an amendment of a section of the Political Code which has no reference whatever to said municipal corporation. And "it is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special Acts passed for the benefit of particular municipalities." (1 Dillon on Municipal Corporations, Sec. 87; *S. S. Bank vs. Davis*, McCarter, 286; *State vs. Minton*, 1 Dutch. 529; *State vs. Clark*, 1 Id. 54; *State vs. Brannin*, 3 Zab. 484; *Wakworth Co. vs. Whitewater*, 27 Wis. 193; *Janesville vs. Merkol*, 18 Wis. 350.)

2. The Political Code expressly declares that nothing in it affects any Act consolidating cities and counties, or Acts amending or supplementing such Acts. And it is a well settled rule of construction that an amendment to a law is to be construed as to matters arising after its passage, precisely as it would be had it originally formed a part of the Act amended. If the section of the Code which is amended by the Hartson Act, had read before such amendments as it now reads, I do not think it would be claimed that it applied to the city and county of San Francisco.

3. The last clause of Section 6 of Article XI of the Constitution, which is mainly relied upon to support the contention that the Hartson Act applies to the city and county of San Francisco, does not, in my judgment, lend any support to that position. For the clause immediately preceding it in the same section provides that "cities and towns heretofore organized or incorporated, may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine." Now the Constitution declares that the Legislature, by *general laws*, shall provide for the incorporation of cities and towns, but that such general laws shall not apply to cities and towns organized before the adoption of the Constitution, unless a majority of the electors voting at a general election should so determine, and yet it is insisted that a charter of a city, incorporated before the adoption of the Constitution, may be changed by a general Act, which purports to be an amendment of another general Act which has no reference to any city or city and county. It must be admitted, I think, that if the Legislature had passed a general law for the incorporation of cities and counties, and had inserted in it a provision that elections for municipal officers, should be held on the day specified in the Hartson Act for holding elections, it would not apply to the city and county of San Francisco until a majority of the voters, voting at a general election, should so determine. And yet it would be a gen-

eral law which would take immediate effect in all cities, or cities and counties, organized after the adoption of the Constitution. It is therefore clear to my mind that, when the Constitution declares that cities organized before its adoption, shall be subject to and controlled by general laws, it means as to matters not specially provided in charters which existed at the date of the adoption of the Constitution. Otherwise they would be subject to and controlled by general laws passed for the incorporation of cities and towns without having first voted to organize under such laws; and that was the contention of the plaintiff's attorney in *Desmond vs. Dunn*.

But, as before remarked, these questions have been quite fully discussed in the opinions to which I have referred, and no useful purpose could be subserved by going over the same ground at this time.

SHARPSTEIN, J.

I concur: McKinstry, J.

IN BANK.

[Filed August 23, 1882.]

No. 8363.

DONAHUE, PETITIONER, VS. GRAHAM, RESPONDENT.

STREET LAW—SAN FRANCISCO—CONSTITUTION. *McDonald vs. Patterson*, 54 Cal. 245, as to effect of the Constitution of 1879 on the street law of San Francisco followed. (*McKinstry, J.*, and *Sharpstein, J.*, dissenting.)

Wallace and Luke, for petitioner.

J. F. Cowdery, for respondent.

MYRICK, J., delivered the opinion of the Court:

For the reasons given by the Court in *McDonald vs. Patterson*, 54 Cal. 245, the demurrer is sustained.

We concur: Morrison, C. J., Ross, J., Thornton, J., McKee, J.

DISSENTING OPINION.

I dissent. Article XI of the Constitution is headed "Cities, Counties, and Towns." Sections one, two, and three, relate to counties; Sections four and five to counties, and "townships;" Sections nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen to cities, counties, towns, and townships. Sections six, seven, eight,

and nineteen treat especially of *cities*; in which are included the municipalities known as "cities and counties," and "towns." It is apparent that the sections last enumerated, applying as they do, to the same subject-matter, are to be read together as providing a scheme or system. The separation into sections is arbitrary, adopted for convenience of reference, and by it no force is added to the suggestion that one section is to be given independent effect, without any consideration of the language of the other sections which constitute the context. Doubtless the provisions of the Constitution are "mandatory and prohibitory." But it is necessary, in the first instance, to ascertain—as well by reference to other provisions bearing upon the subject as by resort to all other means within our reach—the *meaning* of a particular provision of the Constitution. Only thus can we place ourselves in a position to determine what it is that is commanded or prohibited by such provision.

The first sentence of the nineteenth section of Article XI of the Constitution of the State reads: "No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable, or may be assessed, upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

Section six of the same article reads: "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated, may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof, framed and adopted by authority of this Constitution, shall be subject to and controlled by general laws."

The making of provisions for municipal improvements and work "in, upon, or about" the streets, is peculiarly within the province of a city government, and has always been so treated and considered. There is nothing in the Constitu-

tion to indicate that it was the intention of its framers to make this a matter of *State* regulation; on the contrary, there are numerous provisions in the instrument, showing that it was their purpose to vest in the local government the management and control of all matters of local interest.

In the absence of any provision of the Constitution (like that found in Section One of Article XXII) apparently annulling such statutes, passed prior to the adoption of the present Constitution, as the Legislature is prohibited from passing under it, there would be no difficulty in construing the first sentence of Section 19, Article XI.

In the first place, it would be prospective, because there would be nothing in the Constitution to make it retroactive. In the next place, inasmuch as no assessments can be levied except in pursuance of a *law*, the prohibition would, and could only, be given practical effect by holding that it restrained the Legislature from providing in the future for the making or doing in cities of any public improvements or street work (to be paid for by assessment), before the cost had been estimated and assessments therefor levied.

Section 19, of Article XI, relates to public improvements and street work "in cities." As we have seen, such improvements and work are peculiarly a matter of local interest, to be conducted by, or under the direction of the city authorities, by virtue of powers conferred upon them by the charter or Act of incorporation. Except, therefore, for Section 1, of Article XXII, (the section which, by nullifying laws inconsistent with the present Constitution, is said to nullify every Act passed before the adoption of the present Constitution which the Legislature under the present Constitution is prohibited from passing,) it would be very plain, that the first sentence of Section 19, of Article XI, simply prohibited a future Legislature from providing in *any general law for the organization of municipal corporations*, passed in accordance with Section 6, of Article XI, that any public improvement could be made or street work done, until after the cost had been estimated, and assessments therefor levied.

Thus, in order to give effect to both provisions, Sections 6 and 19 of Article XI should be read together, and interpreted as saying: "Corporations for municipal purposes shall not be created by special laws; but the Legislature by general laws, shall provide for the incorporation, organization, and classification of cities and towns; provided that no such general laws shall authorize public improvements of street work, to be made or done *before* the cost has been estimated and assessments levied therefor. Cities and towns heretofore or-

ganized or incorporated *may become* organized under such laws, whenever the majority of the electors voting at a general election shall so determine," etc.

The duty to provide that the cost of public improvements and street work, in cities, shall be estimated, and assessments levied, before any improvement is commenced, or work done, would be imposed upon the Legislature *as a portion* of its duty, by general laws, to provide for the incorporation, organization, and classification, of cities.

As a part is contained within the whole, if the first sentence of Section 6, Article XI, did not put an end to every special municipal corporation created prior to the adoption of the Constitution, the first sentence of Section 19, of the same article, did not repeal or annul that portion of any special act, creating a municipal corporation, which provided for making public improvements or doing street work, within such corporation, *prior* to assessments for the cost thereof.

The "street law" of San Francisco is a part of the "Consolidation Act" or charter of the city and county of San Francisco. (Stats. 1871-2, p. 804.) The charter of the city and county of San Francisco has continued in force since the adoption of the present Constitution, and will continue in force until a general law for the incorporation of cities and towns is passed, and a majority of the electors of the city and county shall determine to reorganize under such general law, or until a new special charter shall be formed as provided in Section 8. (*Desmond vs. Dunn*, 55 Cal. 242.)

It necessarily follows, from what has been said, that the "street law," a portion of the charter of the city and county of San Francisco, will continue in force until a general law shall be passed for the incorporation, organization and classification of cities and towns, and until a majority of the electors in said city and county, voting at a general election, shall determine to reorganize, and the people of the city and county shall reorganize under such general law, or until freeholders are elected, etc., as by Section 8 provided.

In *Desmond vs. Dunn* it was held, in view of the last sentence of Section 6, Article XI, that existing special city, and city and county incorporations were taken out of, and were not subject to, the general provision of Section 1 of Article XXII, which made an end of all laws inconsistent with the present Constitution—either on the adoption of the Constitution or on the first day of July, 1880—and that the charter of San Francisco was still a law, notwithstanding the first clause of Section 6, Article XI, declares that corporations for municipal purposes "shall not be created by

special laws." As we have seen, the first sentence of Section 19 is to be read in connection with the first sentence of Section 6. Together they constitute a single mandate to the Legislature, by which it is commanded to pass general laws providing for the incorporation, etc., of cities and towns; such laws to provide that no street work, etc., should be done prior to an estimate of its cost and assessments therefor. If a special charter granted before the new Constitution continues, notwithstanding the prohibition therein of special charters, it continues as a whole. If it continues in spite of one of the prohibitions found in Sections 6 and 19, it continues despite the other prohibition. Under the present Constitution the Legislature cannot grant a special municipal charter, but must pass general laws furnishing means for the formation or organization of municipal corporations; and such general laws must not permit street work to be done before assessments to pay for it are levied, but must provide for an estimate of the cost, and the levy of assessments therefor, before any work is done. The Constitution declares that every law inconsistent with the present Constitution shall go out of existence either on the first of January or the first of July, 1880. Yet, notwithstanding this general declaration, the special act chartering the city and county of San Francisco did not go out of existence, because the Constitution itself recognizes the continued existence of such special municipal corporations by providing that any of such may reorganize under the general laws to be passed. The "street law" of 1872 is a part of the special charter of San Francisco.

McKINSTRY, J.

I concur: Sharpstein, J.

DEPARTMENT No. 2.

[Filed August 22, 1882.]

No. 8264.

SIMON HIMES, RESPONDENT,

VS.

N. P. JOHNSON, APPELLANT.

WATER RIGHT—APPROPRIATION—PARTY—ACTION—ABATEMENT. Action for diverting water from plaintiff's ditch. As a separate answer defendant set up that one Alfred Himes was equally interested with plaintiff in the land, ditch, spring, and water right described in the complaint, and also in the relief sought by the action, and that he should be joined as a party plaintiff. *Held*, such interest would not make said A. H. a necessary party to the action (Code of Civil Procedure, 384),

and therefore the plea in abatement raised an immaterial issue which it was unnecessary to submit to the jury.

Id.—Id.—TESTIMONY. Objection to testimony as to the rights of persons on the stream below the premises of both plaintiff and defendant, *Held*, properly sustained.

Id.—INSTRUCTION. Objections of defendant that an instruction as to location and appropriation of water was too general, and that it should have been restricted to a location or appropriation made on the public lands of the United States, in accordance with the local customs, laws, or decisions of the Courts of this State, *held*, untenable.

Id.—Id. Defendant requested an instruction: "The jury are instructed that in order to acquire a vested right, by appropriation, to the use of water, or to a water ditch, upon the public lands of the United States, in the sense of the ninth section of the Act of Congress, passed July 26, 1866, such water must have been appropriated, and such ditch constructed in the manner recognized by the *local customs*, laws, or decisions of the Courts of this State." The Court struck out the words "*local customs*." *Held*, the instruction as modified was not erroneous.

Id.—COSTS—DAMAGES—TRESPASS—INJUNCTION. The plaintiff recovered a judgment for fifty dollars damages and costs of the action. *Held*, the Court erred in giving the plaintiff a judgment for costs. True, the plaintiff prayed an injunction, but that was denied, and the action thereafter should have been treated as one for damages only. It is quite clear that a judgment for fifty dollars damages in such an action would not carry costs.

Appeal from Superior Court, Sierra County.

P. Vanclef, for appellant.

Gale & Jones and Soward, for respondent.

By the COURT:

The interest which it is claimed by appellant that Alfred Himes had in the subject-matter of this action would not make him a necessary party to it. (C. C. P. 384.) Therefore the plea in abatement raised an immaterial issue which it was unnecessary to submit to the jury.

We are unable to see what relevancy testimony as to the rights of persons on the stream below the premises of both plaintiff and defendant could have to the issues in this action, and we think that the objection to the introduction of such testimony was properly sustained.

The objections made to the instructions given to the jury are, in our opinion, untenable; and we do not think that the Court erred in modifying, as it did, one of the instructions which appellant's attorney requested to be given.

The plaintiff recovered a judgment for fifty dollars damages and the costs of the action. We think that the Court erred in giving the plaintiff a judgment for costs. It is true that the plaintiff prayed an injunction, but this was denied, and the action thereafter should be treated as one for damages only. It is quite clear that a judgment for fifty dollars damages in such an action would not carry costs.

Judgment and order reversed.

DEPARTMENT No. 2.

[Filed August 30, 1882.]

No. 7490.

A. A. FERGUSON AND W. H. HILLHOUSE,
RESPONDENTS,

VS.

RICHARD NEVILLE, APPELLANT.

Mining Location—Aliens—Chinese—Quiet Title—Conveyance—Revised Statutes of the United States. The fact that the grantees of qualified locators who had made a valid location of a mining claim were aliens, through whom plaintiffs, in an action to quiet title, claim, is no defense for defendant, tracing title under a second location made subsequent to the acquisition of title by the plaintiffs.

Id.—Id. Section 2319, B. S. U. S., does not apply, because the aliens did not take any steps to acquire the title under the Act of Congress, but the title was acquired by persons under whom they claimed, who were citizens of the United States and qualified to occupy and purchase under Section 2319, B. S. U. S.

Id.—Id. The grantors of plaintiffs, although aliens (Chinese), were *bona fide* residents of the State, and capable of taking, by purchase, the mining ground in controversy.

Id. Further: The aliens could take and hold until "office found."

Appeal from Superior Court, Nevada County.

Johnson & Cross, for appellant.

Dibble & Kitt, and *Searles, Niles & Searles*, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The statement on motion for a new trial in the above case presents the following state of facts: The plaintiffs on the trial introduced evidence showing that on the seventh day of December, 1876, the mining ground described in the complaint was a portion of the mineral land of the United States; that on that day Rose and Rehberg, who were both citizens of the United States, over the age of twenty-one years, located said ground as a mining claim in accordance with the local rules and customs of miners in that vicinity, and according to, and fully complying with, the provisions of the Acts of Congress relating to such locations; that thereupon Rose and Rehberg went into the possession and occupancy of the premises, each claiming the undivided one-half thereof, and remained in the possession and occupancy thereof until May, 1877, at which time Rehberg conveyed his interest to one Hoffman, a citizen of the United States, over the age of twenty-one years; and that thereafter Rose

and Hoffman remained in possession of the premises in controversy until the month of July, 1877, in which month they conveyed to Wing Hung and others, who were aliens, and natives of the Empire of China. None of the grantees of Rose and Hoffman had made or filed a declaration of intention to become citizens of the United States. In July, 1878, Wing Hung and others, the grantees of Rose and Hoffman, conveyed the mining ground in controversy to the plaintiff Ferguson, who entered into the possession and occupancy of the same until the twenty-eighth day of October, 1878. On the seventh day of October, 1878, the plaintiff Ferguson, conveyed an undivided one-half interest in the property to the plaintiff Hillhouse. It is admitted that on the twenty-eighth day of October, 1878, the grantors of the defendant, who were citizens of the United States, and over the age of twenty-one years, located the ground in dispute as a mining claim, in accordance with the local rules and customs of miners in that vicinity, and in accordance with the provisions of the Acts of Congress relating to such locations, and that defendant and his grantors remained in the possession thereof down to the time when this suit was commenced.

Plaintiffs brought this action to quiet their title to the mining ground, and were nonsuited. Afterwards the Court set aside the nonsuit and granted plaintiffs a new trial. From the order granting a new trial defendant prosecutes this appeal.

Defendant relies upon Section 2319 Revised Statutes of the United States, in support of the appeal. That section reads as follows:

"All valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The defendant's argument is, that Wing Hung and his co-grantors were not citizens of the United States and had never declared their intention to become such, and therefore they were excluded from the Act of Congress, by its express terms.

But the answer to this argument is, that they did not take

any steps to acquire the title under the Act of Congress; but the title was acquired by persons under whom they claim (Rose and Rehburg), who were citizens of the United States, and in all respects qualified to occupy and purchase under Section 2319, referred to above. They located the claim in December, 1876, in accordance with the local rules and customs of miners in that vicinity, and also according to, and having fully complied with, the provisions of the Acts of Congress relating to such locations. They also went into the possession and occupancy of the claim, and continued to occupy and possess the same until they sold to Wing Hung and others. The title, therefore, passed out of the United States, and was vested in Rose and Rehburg, who being the owners thereof, had a right to make any sale or disposition of the property not inconsistent with the laws of this State. By Article I, Section 17, of the Constitution in force at that time, it was provided that "foreigners who are, or who may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native born citizens."

It is admitted in the record in the case, that the grantors of plaintiffs, although Chinese, were all of them *bona fide* residents of the State of California. It is very clear, therefore, that Wing Hung and his co-grantors were capable of taking by purchase the mining ground in controversy, and their grantors having acquired the title of the United States to such mining ground, had a full and complete right to convey the same.

But we might concede that Wing Hung and his associates had no right to take and hold the fee by purchase, and the result, so far as the present decision is concerned, would be the same. They could take and hold until "office found." "Though an alien may purchase land, or take it by demise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the State, upon an inquest of office found. His title will be good against every person but the State. * * * If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the Government to seize the land. His conveyance is good as against himself, and he may, by a fine, bar persons in reversion and remainder, but the title is still voidable by the sovereign upon office found." (2 Kent's Com. 61, 62.)

It is not pretended there has been an "inquest of office," or that any steps were ever taken on behalf of the Government

to seize the land, or in any manner to test the right of Wing Hung and his co-grantees to hold the same; but the case simply shows that after there was a divestiture of the title of the United States by a valid location under the rules and customs of the vicinity by a locator, in accordance with the mining laws, and after an adverse possession and occupancy, long continued and still existing at the time, the defendant's grantors attempted to acquire the title to the mining ground in controversy by a second location. We are of the opinion that they acquired no right or title by such location, and that the new trial was properly granted.

Order affirmed.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed August 22, 1882.]

No. 7910.

NICKERSON, RESPONDENT,

vs.

CALIFORNIA RAISIN COMPANY, APPELLANT.

DEFAULT—AFFIDAVIT OF MERITS. Action brought in Placer County, summons served in San Francisco County March 5, 1881. Default entered April 6, 1881. The Court denied a motion to set aside the default. *Held*, to have justified the Court below in setting aside the default, an affidavit of merits on the part of the defendant was essential.

ID.—ID. Such affidavit must show that the defendant has fully and fairly stated the facts of the case to his counsel before the advice of the latter could amount to a *prima facie* showing of merits on defendant's behalf.

ID.—ID. An affidavit that defendant "has fully and fairly stated the said defendant's defense in this action" to his counsel, does not answer the requirement.

ID.—ID. The expression used in the affidavit is not the equivalent of a statement that the defendant had fully and fairly stated to his counsel all the facts of the case.

Appeal from Superior Court, Placer County.

Sawyer & Ball and *Hale & Craig*, for appellant.

D. E. Alexander, for respondent.

Ross, J., delivered the opinion of the Court:

To have justified the Court below in setting aside the default, an affidavit of merits on the part of the defendant was essential. Such affidavit must show that the defendant has

fully and fairly stated the facts of the case to his counsel, before the advice of the latter could amount to a *prima facie* showing of merits on defendant's behalf. It is obvious that a statement, such as is found in the affidavit in the present case, that defendant has "fully and fairly stated the said defendant's defense in this action" to his counsel, does not answer the requirement. It might be that the defense relied on was a purely technical one, that did not touch the merits of the controversy. The expression used in the affidavit is not the equivalent of a statement that the defendant had fully and fairly stated to his counsel all the facts in the case. Judgment and order affirmed.

We concur: Thornton, J., Sharpstein, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed August 29, 1882.]

No. 8372.

C. P. R. R. CO., APPELLANT,

vs.

SHACKELFORD, RESPONDENT.

ADVERSE POSSESSION—TAXES—CODE—EJECTMENT—AMENDMENT. The adverse possession of defendant commenced more than three years before the amendment to Section 325, Code of Civil Procedure, 1878, relating to payment of taxes by adverse holder, etc. Since then he had paid the taxes. The present action of ejectment was brought in 1881. *Held*, the time which had elapsed in adverse holding before the amendment took effect, must be deemed a part of the time prescribed by the Code for acquiring title by adverse possession. (Sec. 9, C. C. P.)

Id.—Id. The amendment is not retroactive. No part of the Code is retroactive unless expressly so declared.

Appeal from Superior Court, Colusa County.

Goad & Redding, for appellant.

Dyas & Bridgeford, for respondent.

By the COURT:

The only question which arises upon the record is, how does the Act of April 1, 1878, amendatory of Section 325, Code of Civil Procedure, affect cases in which an adverse possession had commenced before the date of passage? Prior to the passage of that amendment an adverse possession might be established without providing that the party or persons, their predecessors and grantors had paid all the taxes, State, county, or municipal, which has been levied

and assessed upon such land. In this case the adverse possession of the defendant commenced on the 18th of March, 1875—more than three years before the passage of the Act above referred to, and it is not shown that the defendant paid any taxes on the demanded premises prior to the 1st of April, 1878—the date of the passage of said Act. Since April 1, 1878, he has paid all the taxes levied and assessed upon said premises. We think that this brings the case fairly within the provision of Section 9 of said Code, which reads as follows:

“When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code.”

The counsel for appellant contends that this only applies to cases arising before the original Code went into effect. To that we cannot assent. The Code, so far as it relates to the payment of taxes by persons holding lands adversely, did not go into effect until sixty days after April 1, 1878, and it did not, in our opinion, change the character of the defendant's possession of said premises prior to that date. More than three of the five years prescribed for acquiring title by adverse possession had elapsed before that Act took effect, and the time which had elapsed at the date of the passage of that amendment must be deemed a part of the time prescribed by the Code for acquiring title by adverse possession.

Sections 9 and 325, Code of Civil Procedure, are parts of the same Act, and as to a limitation or period prescribed by a statute, existing before the passage of the latter section, for acquiring a right or for any other purpose, which had commenced running before the enactment of the said latter section, the two sections must be construed as they would be if both had been enacted at the date of the passage of the latter. As to matters arising after the passage of the latter, they would have to be construed as if both had been passed at the date of the former.

Besides, as was said in *Sharp vs. Blackinslip*, 8 P. C. L. J. 643, “The amendment to Section 325, Code of Civil Procedure, does not purport to be retroactive. No part of the Code is retroactive unless expressly so declared. (C. C. P., Sec. 3.)”

Judgment affirmed.

In the Circuit Court of the United States

DISTRICT OF CALIFORNIA.

Before Justices Field and Sawyer.

[REVISED AND OFFICIAL OPINION.]

THE CASE

OF

THE CHINESE CABIN WAITER.

IN THE MATTER OF AH SING ON HABEAS CORPUS.

The Act of Congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," declares that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said ninety days, to remain within the United States;" and "that the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer from any foreign port or place, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year;" HELD, 1st, that the prohibition upon the master of a vessel is against bringing of any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port; 2d, that an American vessel is deemed to be a part of the territory of the State, within which its home port is situated, and, as such, a part of the territory of the United States; and the crew of the vessel, whilst on board, are within the jurisdiction of the United States, and if foreigners do not lose any right of residence in the United States previously acquired under treaty with their country.

The Act of Congress of May 6, 1882 "to execute certain treaty stipulations relating to Chinese," declares in its first section that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said ninety days, to remain within the United States."

Its second section enacts: "That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer *from any foreign port or place*, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year."

The third section declares that these provisions shall not apply to Chinese laborers who were in the United States on the 17th of November, 1880, or who shall have come before the expiration of ninety days from the passage of the Act, and who shall produce to the master of the vessel and the Collector of the Port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

Section eight requires the master of a vessel arriving from any foreign port or place, at the time he delivers a manifest of the cargo, or reports the entry of his vessel, to deliver to the Collector of the district a separate list of all Chinese passengers "*taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time.*"

Other sections contain various provisions to secure the enforcement and prevent the evasion of the clauses prohibiting the immigration of Chinese laborers; but they are not material to the disposition of the question presented on this application.

The petitioner is a subject of the Emperor of China, and alleges that he came to California six years ago, and has since resided in the State; that for some months past he has been employed as a seaman on board the steamship City of Sydney, which departed from the port of San Francisco on the 8th of May last, bound on a voyage to Australia, and returned to this port on the eighth of this month; that since its return the captain has refused to allow him to land, and detains him onboard in contravention of the Constitution of the United States, and of the treaty between this country and China.

The captain of the steamship returns that he detains the petitioner on board of his vessel, and refuses to allow him to land by reason of the prohibitory and punitive provisions of the Act of Congress, which we have cited. He also sets forth all the facts connected with the employment of the petitioner, stating that he shipped on board of the steamship at the port of San Francisco on the 5th of May last as a cabin waiter; that the vessel is employed in carrying the mails of the United States and of certain foreign powers, as well as passengers and merchandise, between the port of San Francisco and the ports of Sydney in New South Wales, of Auckland in New Zealand, and Honolulu in the Hawaiian Islands; that he signed shipping articles binding himself to go as one of the crew on a voyage from San Francisco to Sydney and back, and went on board of the vessel in pursuance of the contract; that the vessel departed from this port on the 8th of May last, arrived at Sydney on the 4th of June, left Sydney on the 13th of July, and arrived at San Francisco on the eighth of this month, having touched at the ports of Auckland in New Zealand, and Honolulu in the Hawaiian Islands, the petitioner being all the time on board in his capacity as cabin waiter under his contract.

The question presented is whether the petitioner is within the class of laborers whose landing in the United States is prohibited by the Act of Congress. The ninety days after its passage expired on the 4th of August. The captain of the vessel is desirous of obeying the law, and is not actuated by any personal feeling in restraining the petitioner. He is also under this embarrassment: he is bound by his contract to return the petitioner to the port of shipment, and this implies that he shall land him. The detention, if unlawful, renders him liable to both civil and criminal prosecution. He therefore asks the direction of the Court as to his duty; and, with the consent of his counsel, the District Attorney has been heard in support of his action.

We do not, however, find any difficulty in arriving at the meaning of the Act. Its provisions are plain. The master of a vessel is prohibited from bringing within the United States, and landing or permitting to be landed, any Chinese laborer *from any foreign port or place*; and that means, from bringing any Chinese laborer embarking at a foreign port or place. The prohibition does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. When we speak of merchandise as brought from a foreign port, the port of shipment is always understood, and not any intermediate port at which the vessel bringing the goods may have stopped. This is the common understanding of the terms by merchants, and is the interpretation given to them by the Courts. They must be held to have the same meaning when used with reference to the importation of persons from a foreign port, as when used with reference to the importation of goods. The eighth section of the Act confirms this view, if it needed any confirmation; that requires the master of the vessel to deliver a list of Chinese passengers "*taken on board his vessel at any foreign port or place.*" It is the laborers thus taken on board that the master is prohibited from bringing into the United States.

Any other construction would compel a master of an American vessel, leaving a port of the United States with a Chinese seaman or waiter, to send him adrift at a foreign port, at which the vessel might touch, and prohibit the master from bringing him back in accordance with the bond which he is required by existing law to execute. (R. S. Sec. 4576.)

The object of the Act of Congress was to prevent the further immigration of Chinese laborers to the United States, not to expel those already here. It even provides for the return of such laborers leaving for a temporary period, upon their obtaining certificates of identification. It was deemed wise policy to prevent the coming among us of a class of persons, who, by their dissimilarity of manners, habits, religion, and physical characteristics, cannot assimilate with our people; but must forever remain a distinct race, creating by their presence enmities and

conflicts, disturbing to the peace and injurious to the interests of the country. But it was not thought that the few thousands now here, scattered, as they must soon be, throughout all the States, would sensibly disturb our peace or affect our civilization.

And in this connection it should not be overlooked that the petitioner, whilst on board the steamship as one of its crew, was within the jurisdiction of the United States, at all times under their protection, and amenable to their laws. An American vessel is deemed to be a part of the territory of the State within which its home port is situated, and as such a part of the territory of the United States. The rights of its crew are measured by the laws of its State or Nation, and their contracts are enforced by its tribunals. (*Crapo vs. Kelly*, 16 Wall. 610). A foreign jurisdiction even for offenses committed by her crew on board of her in a foreign port, except where the offense is against the law of nations, does not attach unless the acts affect the peace of the port, or persons disconnected from the vessel. (Opinions of Attorney-Generals, Vol. VIII, 73.) It would be, therefore, a singular circumstance in the legislation of the country, if the Act of Congress had been so framed that a subject of China, by his temporary employment on an American vessel sailing from an American port, was deprived of the right of residence, acquired under the treaty with his country. Only the clearest language would justify such a conclusion. Nothing in the Act requires it. Whenever the United States intend to eject any person from their jurisdiction, they will undoubtedly express their purpose in plain terms.

The District Attorney urges against the construction we give, that it will open the door to evasions of the law, contending that it will be impossible to prevent Chinese in a foreign port from taking the place of those shipped here, unless certificates of identification, mentioned in the Act, be exacted from them. The answer to this position is, that for importing other laborers by such evasions, equally as for importing prohibited laborers without any attempt to substitute them for others, the law has provided a penalty; and it would be impossible for the master violating the law to escape detection and punishment. Independently of this consideration, the law touching the shipment of crews, requires that a list of the men shall be furnished to the Collector by the master of every vessel, which shall contain substantially the same particulars of description of every one, which the Act of Congress exacts in the certificate of identification of the Chinese laborer, who may wish to return to the country.

But if the Act of Congress were defective, as we do not think it is, in providing the necessary means of identifying Chinese laborers shipping as seamen, the defect would not change the plain meaning of the sections cited.

We are of opinion that the petitioner is not within the prohi-

bition of the Act of Congress, and that his restraint by the captain of the steamship is unlawful. He must therefore be discharged.

Ordered accordingly.

FIELD, Circuit Justice.

SAWYER, Circuit Judge.

Philip Teare, District Attorney.

McAllister & Bergin, for petitioner.

Milton Andros, for captain.

[REVISED AND OFFICIAL OPINION.]

THE CASE
OF
THE CHINESE LABORERS ON SHIPBOARD.

IN THE MATTER OF AH TIE AND THIRTEEN OTHERS OF THE CREW
OF THE STEAMSHIP CITY OF SYDNEY ON HABEAS CORPUS.

1. The prohibition upon the master of a vessel contained in the Act of Congress, restraining the immigration of Chinese laborers, to bring within the United States from a foreign port or place any Chinese laborer, was intended to prevent the importation of such laborers from the foreign port or place—laborers who there embark on the vessel—and does not apply to the bringing of a Chinese laborer already on board of the vessel touching at the foreign port. The decision in the case of *AH SING*, the Chinese cabin waiter, on this point affirmed.
2. A Chinese laborer who has acquired the right of residence in the United States under the treaty with his country, does not lose such right by shipping on board of an American vessel, in an American port, as one of its crew for a voyage to a foreign port and back, and making such voyage under his shipping articles, though he may land at different times at such foreign port by permission of the captain, his connection with the vessel as part of the crew not being severed.
3. The status of the laborer, or his relation to the vessel as one of its crew, is not changed by the fact that he is permitted by the captain to land for a temporary period. He is bound by his contract of shipment to return with the vessel, and the captain is bound to bring him back. To force him ashore or to abandon him there is a criminal offense, punishable by fine and imprisonment.
4. All laws should be so construed, if possible, as to avoid an unjust or an absurd consequence. Illustrations given.

The petitioners are part of the crew of the American steamship *City of Sydney*. Their case is substantially like that of *Ah Sing*, the Chinese cabin waiter of the same vessel, recently before us on habeas corpus. It differs in only one particular. Like him, they are Chinese, and like him they shipped on board of the steamship on the 5th of May last, signing at the time articles binding themselves to go as part of its crew on a voyage from San Francisco to Sydney and back. One of the petitioners

served on board as a scullion, the others as waiters or pantry-men. The vessel departed from this port on the 8th of May, arrived at Sydney on the 4th of June, left Sydney on the 14th of July, and arrived here on the 8th instant, having touched at the ports of Auckland in New Zealand, and Honolulu in the Hawaiian Islands. At Sydney the petitioners on several occasions, by the written permission of the captain, went on shore and remained a few hours, without, however, severing or intending to sever their connection with the vessel as part of its crew. This fact is the only one distinguishing this case from that of Ah Sing. We there held that the prohibition upon the master of a vessel, contained in the Act of Congress, to bring within the United States from a foreign port or place any Chinese laborer, was intended to prevent the importation of such laborers from the foreign port or place—laborers who there embarked on the vessel—and did not apply to his bringing a Chinese laborer already on board of his vessel touching at the foreign port or place. We also held that whilst on board the American vessel, the laborer was within the jurisdiction of the United States, and did not lose, by his employment, the right of residence here previously acquired under the treaty with his country.

The status of the petitioners, and their relation to the vessel, were not changed in any respect by the fact that they were permitted by the captain to land for a few hours at the port of Sydney. They were bound, by their contract of shipment, to return with the vessel; and the captain was bound to bring them back. He could not have forced them ashore in a foreign port; nor could he have abandoned them there. Had he done either of these things, he would have rendered himself liable to criminal prosecution. An Act of Congress, passed more than half a century ago, and re-enacted in the revised statutes, declares that, "every master or commander of any vessel belonging in whole or in part to any citizen of the United States, who, during his being abroad maliciously and without justifiable cause forces any officer or mariner of such vessel on shore in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be punished" by fine and imprisonment. The fine may extend to five hundred dollars, and the imprisonment to six months. (R. S., Sec. 5363.) The terms "officers and mariners" here used apply to all persons, other than the captain, employed under shipping articles on the vessel in any capacity. In *U. S. vs. Coffin*, (1 Sumner, 394), Judge Story was called upon to construe this Act, and he held that the "home" referred to was not the home of any seaman, native or foreign, but the home port of the ship for the voyage.

In another case, (*Matthews vs. Offley*, 3 Sumner, 125), the same distinguished Judge had occasion to consider the circumstances under which a foreign seaman, who had acquired a residence in the United States, and had been engaged in the merchant service, could be deemed to have abandoned that service so as to justify the captain of another vessel in refusing to bring him home from a foreign port as a destitute seaman by direction of the Consul; and the Judge said, that some overt act on the seaman's part, such as engaging in a foreign service, or resuming his original native character, or disowning his American character and domicile, seemed indispensable to rebut the presumption that he still attached himself to the American service. Something equally indicative of an intention on the part of a Chinese laborer, who had shipped on an American vessel as one of its crew in an American port, to abandon the service of the ship and his residence in the United States, would seem to be necessary to justify the master in refusing to bring him back. The law of Congress as to the duty of the master in this particular, has not been, in terms, repealed by the Act restraining the immigration of Chinese laborers, and the purpose of the latter Act does not require us to hold that the former is repealed by implication. A Chinese laborer on an American vessel can not be held to lose his residence here, so as to come within the purview of the Act, by such temporary entry upon a foreign country as may be caused by the arrival of the vessel on her outward voyage at her port of destination, or her touching at any intermediate port in going or returning, or her putting into a foreign port in stress of weather. And we should hesitate to say that it would be lost by the laborer passing through a foreign country in going to different parts of the United States by any of the direct routes, though we are told by the counsel of the respondent, that a Chinese laborer having taken a ticket by the overland railroad from this place to New York, by the Central Michigan route, which passes from Detroit to Niagara Falls through Canada, was stopped at Niagara and sent back, as within the prohibition of the Act of Congress, and on attempting to retrace his steps was again stopped at Detroit. A construction which would justify such a proceeding cannot fail to bring odium upon the Act, and invite efforts for its repeal. The wisdom of its enactment will be better vindicated by a construction less repellent to our sense of justice and right.

All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion. "General terms," said the Supreme Court, in a case before it, "should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." (*U. S. vs. Kirby*, 7 Wall, 482.) So the Judges of England construed the law which

enacted that a prisoner breaking prison should be deemed guilty of felony, holding that it did not apply to one breaking out when the prison was on fire, observing that the prisoner was "not to be hanged because he would not stay to be burnt." And in illustration of this doctrine the construction given to the Bolognian law against drawing blood in the street, is often cited. That law enacted that whoever thus drew blood should be punished with the utmost severity, but the Courts held that it did not extend to the surgeon who opened the vein of a person falling down in the street in a fit. The application sought to be made of that law to the surgeon was hardly less absurd than some of the applications, which, without much reflection, are sought to be made of the Act of Congress.

The petitioners must be discharged.

Ordered accordingly.

FIELD, Circuit Justice.

SAWYER, Circuit Judge.

McAllister & Bergin, for the petitioners.

Milton Andros, for the captain.

Abstracts of Recent Decisions.

FEDERAL COURTS—ENFORCING STATE LAW—WILL FOLLOW STATE PRECEDENTS. It is the duty of the Federal Courts in all cases within their jurisdiction depending on local law to administer that law, so far as it affects contract obligations and rights, as it was judicially expounded at the time such obligations were incurred or such rights accrued; and they do not feel bound to follow later decisions of the State Courts modifying the rule previously expounded by them, in respect to contracts made on the faith of the law as first expounded. *Taylor vs. Ypsilanti*, U. S. S. C., March 20, 1882, 4 Morr. Trans. 336.

MUNICIPAL BONDS—DONATION TO PUBLIC IMPROVEMENTS—INNOCENT PURCHASER. 1. A purchaser from a *bona fide* holder of negotiable paper succeeds to his rights. 2. There is no substantial distinction between a donation by a municipal corporation to a public improvement to aid its construction and a subscription to its stock for the same purpose. 3. Bonds voted to one company are not invalidated by being delivered to a consolidated company into which the first company had been merged, and which under a State statute succeeded to all the rights and privileges of the first company. *Township of New Buffalo vs. Cambria Iron Co.*, U. S. S. C., March 20, 1882, 4 Morr. Trans. 353.

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No. 3.

Current Topics.

IS THE HEIR A NECESSARY PARTY TO ACTIONS BY OR AGAINST AN EXECUTOR OR ADMINISTRATOR, WHERE THE TITLE TO REALTY IS INVOLVED?

Section 369 of the Code of Civil Procedure provides that an executor or administrator may sue without joining with him the heir.

Section 1582 provides that actions for the recovery of possession of real property may be maintained by or against an executor or administrator in all cases in which the same might have been maintained by or against the decedent. This section leaves the question of joinder of parties in doubt.

Section 1597 provides that the executor or administrator may be compelled, through a petition filed in the matter of the estate and on publication of notice, to convey real property, when the decedent had contracted in writing to convey it.

Section 1539 provides for the appearance of the heirs when the executor or administrator applies for an order to sell real property.

While Section 369 provides only for actions by the administrator alone, yet the effect of such an action may be the same as if the administrator had been defendant. An administrator, suing under Section 369, and not making the heirs either parties plaintiff or defendant, may be unsuccessful. *Rice vs. Cunningham*, 29 Cal. 492, is a case in point. This was an action of ejectment brought by an administrator, and decided against him.

Are these two sections (369 and 1597, C. C. Pr.) law?

In a recent decision (*Estate of Corwin*, 10 Pac. C. L. J. 15) the Supreme Court has virtually held Section 1597 as impractical and unconstitutional. A petition had been filed against the administrator to compel a conveyance under this section, and Baldwin (who was interested in the property for which a conveyance was sought) was not made a party. The Court said: "Under such circumstances a Court of equity would not decree a specific performance. * * * It was not the intention of the statute to vest in the Probate Court more extensive power than was administered by a Court of equity."

There is no provision for making any one but the administrator a party to a proceeding under this section. If the heirs are interested in the property for which a conveyance is sought, they cannot be made parties. In order to make them parties, an action must be instituted against the administrator (Section 1602). But why go to the trouble of instituting a separate action, if they are not *necessary* parties? A petition under Section 1597 would do as well as a complaint and summons against the administrator alone.

At common law the real estate vested in the heir, and the personal estate vested in the administrator. Under our system the administrator takes possession of both the realty and personalty. In *Beckett vs. Selover*, 7 Cal. 230, the Court thus explained the two systems: "At common law the real estate of the intestate vested in the heir, and the personal estate in the administrator; but under our system the true theory would seem to be that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession." In this case the Court held that an heir could contest the validity of a claim, on the hearing of a petition for leave to sell the realty belonging to the estate, and stated that the petition to sell the real estate of an intestate, with its requirements as to personal service upon the heirs, was a substitute, under our system, for the action against the heir.

The theory of this decision and the law as laid down in Section 1539, is that the heir is a necessary party to all actions concerning the realty of his intestate, the title to the property descending to him from the ancestor and not from the administrator.

If this theory be correct, in actions brought under Sections 369 and 1597, the heirs should be made parties, or they should be personally cited to appear at the hearing or trial.

In *Ashley vs. Cunningham*, 45 Cal. 485, some doubt is thrown upon the correctness of this theory. The doctrine of *Ashley vs. Cunningham* is that the administrator appearing in an action involving the interests of the estate, represents as well the heirs as the creditors of the deceased, and not only the interests of the heirs and creditors, *but also the title which the deceased had at the time of his death*. It was therefore held that the heirs were estopped by a judgment in ejectment rendered against the administrator (in an action instituted under Sections 369 and 1582), though not made parties, because the *title and seisin of the intestate* had been put in issue by the person who represented that title. In *Beckett vs. Selover* the Court said that the administrator was more the representative of the creditors than of the heirs (7 Cal. 230).

We submit that the two cases differ most widely. Under the

doctrine of the earlier case, the heirs are necessary parties to all actions involving title to the realty of the intestate. Under the doctrine of the later case, they are necessary only in applications by the administrator for the sale of real property, and then only because of a statutory requirement.

Supreme Court of California.

IN BANK.

[Filed August 26, 1882.]

No. 7033.

SACRAMENTO VALLEY RECLAMATION COMPANY,
RESPONDENT.

VS.

COOK, APPELLANT.

SWAMP AND OVERFLOWED LANDS—ACTS OF CONGRESS OF SEPTEMBER 28, 1850, AND OF JULY 23, 1866—PATENT—SECRETARY OF THE INTERIOR. The donation of swamp and overflowed lands by the United States to the States in which such lands were situated at the date of the passage of the Act of September 28, 1850, was a grant *in present*, by which the title to those lands passed at once to the States in which they lay, except as to States admitted to the Union after its passage.

Id.—Id. The second section of the Swamp Land Act of September 28, 1850, devolved upon the Secretary of the Interior the duty, and conferred on him the power of determining what lands were of the description granted by that Act, and made his office the tribunal whose decision on that subject was to be controlling.

Id.—ACT TO QUIET LAND TITLES IN CALIFORNIA. The last clause of Section 4 of the Act of Congress of July 23, 1866, "To quiet land titles in California," seems to have been inserted with special reference to cases in which the State, prior to the passage of said Act, had selected and segregated lands as swamp and overflowed, which had not at the date of said Act been listed to said State.

Id.—Id. The State having selected and segregated the lands in controversy as swamp and overflowed, was in a position to have the character of said lands and the right of the State thereto determined in the mode prescribed in the fourth section of that Act, which, in this case, was done by the proper officers of the United States Land Department.

Id.—Id.—PURCHASER PENDING PROCEEDINGS. The State, by the selection and segregation of said lands as swamp and overflowed prior to July 23, 1866, had acquired the right under the Act of that date to have the character of said lands determined in the mode prescribed by that Act; and anyone who purchased said lands from the United States, pending the proceedings for the determination of the question of the right of the State to said lands, took subject to that determination

which, if in favor of the State, entitled it to a patent which would relate back to the 28th of September, 1850—the date of the passage of the Act granting swamp and overflowed lands to the State.

ID.—ID.—PATENT—RELATION—GRANT. The grant made by the Act of September 28, 1850, being a grant in *presenti* the patent issued to the State related back and gave certainty to the title as of the date of the grant.

ID.—ID.—LAND DEPARTMENT OF THE UNITED STATES. The fact that the Land Department of the United States after the passage of the Act of July 23, 1866, and before listing said lands to the State, sold and patented the same to defendant's grantor, cannot be held to be a determination by said department that said lands were not swamp and overflowed.

ID.—ID.—ACT OF JULY 23, 1866. The object of the Act of July 23, 1866, to enable the State to establish its claim to lands as swamp and overflowed, could not be defeated by the issuance of a patent of said lands to some outside party, pending the proceedings provided for in said Act.

ID.—SECRETARY OF INTERIOR—EVIDENCE. The Secretary of the Interior having determined the character of said lands, evidence tending to impeach that determination was inadmissible in this action—and properly ruled out by the Court.

Appeal from Sixth District Court, Yolo County.

Belcher & Belcher, for appellant.

Adams & Treadwell, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The respondent claims that the demanded premises were swamp and overflowed lands; and that as such they were granted to the State by the Act of Congress of the 28th of September, 1850. That said lands were selected and segregated by the State prior to the passage of said last mentioned Act of July 23, 1866, and that after the passage of said last mentioned Act the character of said lands was determined by testimony taken by the United States Surveyor-General, who decided that said lands were swamp and overflowed lands; and that that decision was approved by the Commissioner of the General Land Office of the United States, and that in accordance with said determination and decision said lands were, on the 12th of December, 1873, listed to the State. On June 3, 1874, a patent of said lands was issued by the United States to the State, which, on the 18th of August, 1874, issued a patent of the same lands to the respondent.

The appellant claims title to the same lands under a patent of the United States issued to William C. Belcher on the 5th of August, 1869, whose title, through mesne conveyance, vested in appellant on the 14th of December, 1870.

It is sufficiently obvious that unless the title to said lands had passed out of the United States prior to the issuance of

said patent to Belcher the judgment in this action was erroneous; so that the only question which we now have to consider is whether the title to said lands had vested in the State prior to the date of the patent to Belcher.

It is as well settled as anything can be by the Courts that the donation of swamp and overflowed lands by the United States to the States in which such lands were situated at the date of the passage of the Act of September 28, 1850, "was a grant *in presenti*, by which the title to those lands passed at once to the States in which they lay, except as to States admitted to the Union after its passage." (*French vs. Fyan*, 93 U. S. 169.)

In order, however, to avoid confusion it was necessary to provide for a method of determining what lands were "swamp and overflowed lands." And so it was provided in the second section of the Swamp Land Act, "that it shall be the duty of the Secretary of the Interior, as soon as practicable after the passage of this Act, to make out an accurate list and plats of the land described as aforesaid, and transmit the same to the Governor of the State, and, at the request of the Governor, cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the State, subject to the disposal of the Legislature thereof." And in *French vs. Fyan*, *supra*, the Court says: "We are of the opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that Act, and made his office the tribunal whose decision on that subject was to be controlling."

But we are not advised that the appellant disputes the conclusiveness of the determination of the Secretary of the Interior upon the question whether any particular lands are swamp and overflowed within the meaning of the Swamp Land Act. On the other hand he claims that the department, of which the Secretary is the head, did necessarily determine when it sold the lands in controversy to Belcher, that such lands were not swamp and overflowed, within the meaning of said Act. How this might be in the absence of any such provisions of law as those contained in Section 4 of the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California," it may not be necessary to consider in this case. The last clause of that section seems to have been inserted with special reference to cases, in which the State, prior to the passage of said Act, had selected and segregated lands as swamp and overflowed,

which had not, at the date of said Act, been listed to said State. The clause to which we now refer reads as follows: "If the authorities of said State shall claim as swamp and overflowed land any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right of the State to the same, shall be determined by testimony to be taken before the Surveyor-General, who shall decide the same, subject to the approval of the Commissioner of the General Land Office." The State having selected and segregated, prior to the passage of said Act, the lands in controversy, as swamp and overflowed, was in a position to have the character of said lands and the right of the State thereto determined in the mode prescribed in said clause. And that was done, as appears by a certificate of the proper officers of the United States Land Department, of which the following is a copy:

GENERAL LAND OFFICE.
Swamp Land Division, December 10, 1873. }

"This certifies that the foregoing tracts of land are claimed by the State of California, under the fourth section of the Act of Congress, approved July 23, 1866, as having been segregated by said State as swamp lands prior to that date, by surveys in conformity with the system of surveys adopted by the United States.

"Approved amended maps, showing such segregation, have been returned by the United States Surveyor-General for California, and are now on file in this office; also, that said lands have been inadvertently patented to individuals who did not acquire any right thereto by virtue of any claim subsisting on or prior to the date of said Act of July 23, 1866; said individuals have been duly notified that said patents are erroneous and illegal, and requested to surrender the same, with a relinquishment of the apparent title acquired thereby, but they have refused or neglected to comply with said notice and request.

"Said lists have been compared with the tract books and township plats of this office, and found to be free from any valid, legal interference by sale or otherwise, subsisting on or prior to the date of said Act of July 23, 1866."

The grant made by the Act of September 28, 1850, being a grant *in presenti*, the patent issued to the State related back and gave certainty to the title as of the date of the grant. (*French vs. Ryan, supra.*) So that the title of the State under which the plaintiff claims is the elder and better

title, unless the fact that the Land Department of the United States after the passage of the Act of July 23, 1866, and before listing said lands to the State, sold and patented the same to Belcher, can be held to be a determination by said department that said lands were not swamp and overflowed. We do not think that the sale and patent to Belcher can be so construed. The State, by the selection and segregation of said lands as swamp and overflowed prior to July 23, 1866, had acquired the right under the Act of that date to have the character of said lands determined in the mode prescribed by that Act; and any one who purchased said lands from the United States pending the proceedings for the determination of the question of the right of the State to said lands, took subject to that determination, which, if in favor of the State, entitled it to a patent, which would relate back to the 28th of September, 1850 the date of the passage of the Act granting swamp and overflowed lands to the State.

And this view appears to us to receive some support from what the Supreme Court of the United States said in *R. R. Co. vs. Smith*, 9 Wallace, 95, from which we quote the following: "By the second section of the Act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact (what lands were swamp and overflowed) and furnish the State with evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the States did not depend on his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of the right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay."

In this case it does not appear that the Secretary had prior to July 23, 1866, determined the character of the demanded premises, although the State had prior to that date selected and segregated said lands as swamp and overflowed; and one object of the Act of July 23, 1866, was to enable the State to establish its claim to said lands as swamp and overflowed. We do not think that that object could be defeated by the issuance of a patent of said lands to some outside party, pending the proceedings provided for in said Act.

The Secretary of the Interior having determined the character of said lands, evidence tending to impeach that determination was clearly inadmissible in this action, and properly ruled out by the Court.

Judgment and order denying a motion for a new trial affirmed.

We concur: McKinstry, J., Thornton, J., Ross, J., McKee, J., Morrison, C. J., Myrick, J.

IN BANK.

[Filed August 21, 1882.]

No. 10,736.

PEOPLE, RESPONDENT, vs. HARRIS, APPELLANT.

JURY—CHALLENGE—ROBBERY—PREVIOUS CONVICTION—LIFE IMPRISONMENT.
A charge of robbery and previous conviction being found by the jury, defendant must be imprisoned for life; and he is, therefore, entitled to twenty peremptory challenges.

Appeal from Superior Court, San Francisco.

Charles H. Wolff, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The only question necessary for us to decide in this case relates to the number of peremptory challenges to which the defendant was entitled in the Court below.

The prosecution was for robbery, and the information charged that the defendant had been previously convicted of a similar crime, as well as of the crimes of burglary and petit larceny. On the trial the defendant claimed that he was entitled under the Code to twenty peremptory challenges, but the Court held that he was entitled to only ten, and limited him to that number. In this ruling we think there was error.

Section 667 of the Penal Code is as follows:

"Every person who, having been convicted of petit larceny, or an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State Prison, commits any crime after such conviction, is punishable as follows:

"1. If the subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the State Prison for life, at the discretion of the Court, such person is punishable by imprisonment in such prison for life."

The subsequent offense, robbery, is punishable by imprisonment for life in the State Prison, at the discretion of the

Court, under Section 213 of the Penal Code, and, therefore, the defendant was entitled to twenty peremptory challenges, as it was the duty of the Court, under the statute, on a conviction in this case, to imprison the defendant for life in the State Prison. (Penal Code, Section 1070.)

Judgment and order reversed and cause remanded for a new trial.

DEPARTMENT No. 2.

[Filed August 28, 1882.]

No. 8259.

DRUKE ET AL., APPELLANTS,

VS.

HEIKEN ET AL., RESPONDENTS.

GIFT—CAUSA MORTIS—NOTE—ENDORSEMENT. A promissory note payable to order and not endorsed, is the subject of a gift *causa mortis*.

ID.—CIVIL CODE. Section 3101, Civil Code, has not changed the rule in regard to the transfer of negotiable instruments payable to order by endorsement.

ID.—MORTGAGE—ASSIGNMENT—DEBT. The assignment of a note carries the mortgage executed to secure it.

Appeal from Superior Court, Sutter County.

Taylor and Freeman & Bates, for appellants.

Belcher & Barney, for respondents.

By the COURT:

If a promissory note payable to order and not endorsed, is the subject of a gift *causa mortis*, the judgment appealed from must be affirmed, for there is uncontradicted evidence that such a note was given by the decedent as a *donatio causa mortis* to Margaret Heiken, one of the defendants in this action.

The authorities cited by respondents' counsel are somewhat numerous, and all support their contention "that a promissory note payable to order and not endorsed, is the subject of a gift *causa mortis*."

Section 3101 of the Civil Code has not changed the rule in regard to the transfer of negotiable instruments payable to order by endorsement.

The assignment of the note carried the mortgage with it. Judgment affirmed.

IN BANK.

[Filed August 21, 1882.]

No. 7482.

WHITTIER & FULLER, APPELLANTS,
 VS.
 STEGE & STEGE, RESPONDENTS.

BANK — DEPARTMENT — EJECTMENT — CONTRACT TO PURCHASE. Opinion of Department (8 Pac. O. L. J. 690), adopted by the Court in bank. *Further:* It is the duty of the Court below to first dispose of the issues arising on the cross-complaint.

Appeal from Superior Court, Alameda County.

Sharp & Sharp, for appellants.

Taylor & Haight, for respondents.

By the COURT:

This case was before Department One of this Court, and its opinion was filed November 29, 1881, reversing the judgment and remanding the cause for a new trial. (8 Pac. O. L. J. 690.)

We are satisfied with the views expressed by the Department.

It will be the duty of the Court below to first dispose of the issues arising on the cross-complaint.

Judgment and order reversed and cause remanded for a new trial.

IN BANK.

[Filed August 22, 1882.]

No. 8402.

PEOPLE, APPELLANT, VS. CHAPMAN, RESPONDENT.

STATE PRISON DIRECTORS — SALARY — MILEAGE — CONSTITUTION. Under Section 4, Article X of the Constitution, the Legislature has no power to provide mileage or salary for the State Prison Directors. *Accordingly*, Section 17 of the Act to define, regulate, and govern State Prisons of California (Stats. 1880, p. 70), as amended in 1881 (Stats. 1881, p. 80), is unconstitutional.

Id.—Id. The Constitution did not direct the Legislature to "audit and allow" the expenses of the directors; it restricted legislative power to directing how and before what tribunal or board "audit" should be had.

MONEY PAID UNDER VOID ACT—TREASURER—VOLUNTARY PAYMENT. The above section of the Act being void, the money received and appropriated by defendant was withdrawn from the public treasury without authority of law. Where money has been drawn from the treasury without authority of law it is recoverable back. Money thus obtained does not become the property of the receiver; and it is unconscientious for him to retain it. At all events, the receipt of it is not a voluntary payment which precludes the people of the State from recovering it back.

Appeal from Superior Court, Sacramento County.

Attorney-General Hart, for appellant.
Irvine and Edgerton, for respondent.

McKEE, J., delivered the opinion of the Court:

By Article X of the Constitution of 1879, there was created a Board of State Prison Directors to consist of five members, who were to be appointed by the Governor of the State, by and with the advice and consent of the Senate, and to hold their offices for a term fixed by the Constitution. To this Board the charge and superintendence of the State Prison were intrusted; and, in addition, the Legislature was expressly authorized to confer upon the members such other powers and enjoin upon them such other duties in respect to other penal and reformatory institutions of the State as might be prescribed by law. At the same time authority was given to the Legislature to pass such laws as it might deem necessary to further define and regulate the powers and duties of the Board, Wardens, and Clerks of the State Prison, and to carry into effect the provisions of the Constitution.

One of those provisions related to the subject of compensation to the directors. By Section 4 of Article X, it was provided that "the members of the Board shall receive no compensation other than reasonable traveling and other expenses incurred while engaged in the performance of official duties, to be audited as the Legislature may direct."

In 1880, the Legislature, by an Act entitled "An Act to define, regulate, and govern State Prisons of California," approved April 15, 1880, enacted as follows: "Section 17. The directors shall receive no compensation for their services, but shall be paid for traveling and other expenses, while engaged in the discharge of their duties, twenty cents per mile for the number of miles actually traveled;" and in March, 1881, amended the section so as to read as follows: "Section 17. The directors shall receive no compensation other than ten cents per mile for traveling expenses, and one hundred dollars per month for other expenses incurred while engaged the performance of official duties."

As a director the defendant is charged to have received and appropriated for the years 1880 and 1881 the sum of more than three thousand seven hundred dollars, when, in fact, all his expenses incurred in the performance of his official duties did not exceed in either year the sum of two hundred dollars: and the action in hand was brought to recover back the money which he has unlawfully received and appropriated.

Reception and appropriation of the money as compensation to which he was entitled as a director, under the statutes of 1880 and 1881, are admitted by the defendant. But it is contended that those statutes are repugnant to the provisions of the Constitution upon the subject of compensation, and were wholly ineffectual to legalize the abstraction of the money from the public treasury. Whether they are constitutional or not, is, therefore, the principal question to be decided.

Unquestionably, the Constitution regulated the compensation to which the directors of the State Prison were entitled. As regulated, they were to receive no other than "reasonable traveling and other expenses" incurred in the performance of official duties; and as the paramount law of the State on the subject, that regulation was binding not only upon the directors, but also upon the Legislature. Compensation being fixed by the Constitution, the Legislature, in the exercise of its law-making functions, was without power to unfix it, or to modify or change it. It had no such power, unless given to it by the express words of the Constitution, or by necessary implication. But neither expressly nor impliedly has such power been conferred; on the contrary, the law-making function of the Legislature upon the subject has been, by the express words of the Constitution, restricted to prescribing the mode of procedure for ascertaining the *amount* of the compensation.

Ascertainment by audit as "directed by the Legislature," of the expenses, as defined by the Constitution, expresses the will of the people upon the subject of compensation to the directors; and the Legislature, within the limits of the restrictions imposed upon it by the people in their sovereign capacity, could not change the compensation or audit it.

The Constitution did not direct the Legislature to audit and allow the expenses of the directors; it restricted legislative power to directing how and before what tribunal or board "audit" should be had; but upon that subject both statutes are silent. The statute of 1880 established the system of mileage at twenty cents per mile for the constitu-

tional "reasonable traveling and other expenses," and the statute of 1881 went still beyond; it retained the system of mileage for traveling expenses, and salaried the office for "other expenses." It allowed ten cents per mile for the one, and one hundred dollars per month for the other. Mileage and months—not reasonable expenses—became the things to be audited; but *how* and before what tribunal or board? No directions have been given, no tribunal has been provided.

If either or both of the legislative systems can stand, nothing remains of the constitutional regulation of compensation to the directors. The power of the Legislature rises at once from the limitations of the Constitution to full and complete authority over the entire subject; and it may, in the exercise of its functions, allow as compensation not only ten or twenty cents per mile, and \$100 per month salary, but any amount for mileage or salary; and, instead of reasonable traveling and other expenses as compensation for services rendered while engaged in the performance of official duties, these officers have salaries and mileage.

That was not the intention of the framers of the Constitution, nor of the people who ratified it. From the debates of the Constitutional Convention it appears that the members of the Committee on State Institutions were of one mind as to the management of State Prisons by a board of directors; but they differed upon the number of members which were to constitute the board, and their compensation and the mode of selecting them. A minority were in favor of making the office elective and salaried; the majority favored the policy of appointment by the Governor and Senate, and to hold office without compensation, except payment of necessary expenses incurred while in discharge of official duties. Upon that basis the committee reported Article X of the Constitution, just as it was afterwards adopted by the convention and ratified by the people; and in presenting it to the convention, delegate Van Dyke, acting for the chairman of the committee; explained the provision under consideration as follows: "It will be observed that we have provided that these directors shall have no salaries. It was shown to the committee, to the entire satisfaction of almost all the members, that entirely competent and worthy men can be found in the State for the purpose of reforming them (State Prisons) and so conducting them as to redound to the advantage and benefit of the State—men of means, men who have retired from active business, and who have made this matter a study, who will be willing to give their services

without compensation. I say it was shown to the committee that any number of this class of men could be selected by the Governor, who would serve without any compensation whatever. In fact, the present Prison Commission is purely a voluntary association, composed of that very class of men, and they have done a great deal of good in supervising the prison management in this State. The majority of the committee were fully satisfied that competent, honest men can be had who will perform these duties without pay, save their actual traveling expenses."

Strong opposition was made in convention to the policy of appointment and of requiring men to serve the State without pay for their services. It was urged that whether elected or appointed they should be paid; and that if payment was not provided, "the directors would seek in some way to get pay, and directly or *indirectly* to secure it." (Debates of Convention, pp. 1032.) But after debate the convention refused to make the office elective or salaried. It adopted Article X of the Constitution just as it came from the hands of the committee; and in the address of the members of the convention to the people of the State, the work of the convention in that regard was thus referred to: "It is provided for the appointment of five prison directors, to hold office for ten years without compensation, except necessary expenses while in the discharge of official duties. * * It has been shown that in reference to our insane asylums, the management of which has generally been unexceptionable, a good class of men can be secured to fill the office of directors without salaries; and it is believed that this change will remove the management of our State Prisons from the domain of party politics."

In view of those expressions of thought and intention by the framers of the Constitution upon the subject of compensation to State Prison Directors, and of the intention of the people of the State in ratifying the Constitution, we think it is manifest that the will of the Legislature, as expressed in Section 17 of the statutes of 1880 and 1881, is in conflict with the will of the people as expressed in Section 4 of Article X of the Constitution. The Legislature is absolutely prohibited from any special legislation affecting compensation to officers, especially when that compensation has been fixed by the Constitution. (Secs. 20 and 25, Art. IV, Const.) Section 17 of the statutes of 1880 and 1881 is therefore unconstitutional and void.

Being void, the money received and appropriated by the defendant, was withdrawn from the public treasury without

authority of law. No money can be drawn from the treasury, but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the Controller, (Sections 22 and 29, Article IV, Cons.); where money has been drawn from the treasury without authority of law it is recoverable back. Money thus obtained does not become the property of the receiver; and it is unconscientious for him to retain it. At all events the receipt of it is not a voluntary payment which precludes the people of the State from recovering it back. (*Morgan vs. Palmer*, 2 B. & C. 729; *Clinton vs. Strong*, 9 Johns. 369.)

Judgment reversed and cause remanded.

We concur: Myrick, J., Morrison, C. J., Thornton, J., Sharpstein, J.

(Mr. Justice Ross not having heard the argument took no part in the decision.)

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 8227.

BETTIS ET AL., RESPONDENTS,

VS.

TOWNSEND, APPELLANT.

TRUST—PERSONAL PROPERTY—ACTION—BENEFICIARIES. A trust relating to personal property may be taken advantage of by the beneficiaries. (3251, C. C.)

PRACTICE—FINDINGS—APPEAL. It will be assured that all the findings were sustained by the evidence, where the appeal from the judgment is not taken within sixty days after its rendition. (C. C. P. 939.)

Appeal from Superior Court, Tehama County.

Ellison, Chipman & Garter, for appellant.

Fox, Braynard & Ashurst, for respondents.

By the COURT:

The Court below found that the Independent Order of Odd-Fellows of Red Bluff, a corporation duly incorporated, loaned to the defendant the sum of \$700 for the purpose of redeeming real estate (described in the complaint) the property of one R. S. Bettis, for the benefit of the plaintiffs, who are the children of said Bettis.

That at the time of making the loan defendant accepted the same for the purpose of redeeming the real estate for the benefit of Bettis and his children, and agreed, in case the property should be sold for more than the loan due the bank, and other necessary expenses incurred, he would pay over to the plaintiffs the surplus.

That the property was redeemed by defendant pursuant to such understanding, and was reconveyed to said Bettis by the bank, from which the same was redeemed by the payment of \$640 and interest.

That thereafter said Bettis conveyed the premises to defendant, by deed absolute in form, for the consideration expressed of \$700.

That thereafter, and on the 26th of July, 1877, defendant sold and conveyed said property to J. O. Potts, for the sum of \$1,200, and received that amount from said Potts.

The judgment below was for \$500 in favor of plaintiffs.

The decision of the Court below is somewhat informal, but, in a portion of it, separate from the conclusion of law (C. C. P. 633,) the Court inferred from the evidence that R. S. Bettis was made acquainted with the arrangement between the Odd-Fellows' Lodge and defendant, assented to it, and did all that it was necessary for him to do to carry it into effect.

Those findings are within the issues made by the pleadings.

The appeal is taken by defendant from the judgment.

We must assume that all the findings of the Court below were sustained by the evidence, because the appeal was not taken within sixty days after the judgment was rendered. (C. C. P. 939.)

It is not necessary to inquire, because it is immaterial in the view we take, whether the Superior Court erred in admitting oral testimony with respect to the purpose for which the money was loaned by the Lodge of Odd-Fellows to defendant. The findings show that, as between R. S. Bettis and defendant, the deed from said Bettis to defendant was intended as a mortgage to secure the \$700.

The findings also show that it was agreed that any difference between the \$700 and the amount received by defendant upon the sale of the land, in case the land should be sold by defendant, should be held in trust for the benefit of plaintiffs. This was a trust relating to personal property, and could be taken advantage of by the beneficiaries, the present plaintiffs. (C. C. 2251.)

Judgment affirmed.

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 7209.

MAPPA, ET AL., PETITIONERS AND APPELLANTS,

VS.

THE COUNCIL OF LOS ANGELES, RESPONDENT.

LOS ANGELES—CHARTER—CONTRACT—STREET IMPROVEMENT—ASSESSMENT.

Under the charter of Los Angeles (Stats. 1875-6, p. 710,) the Council must first make a contract for the performance of work before property fronting on the street improved could be assessed to pay for the improvement.

Id. In this case a contract was made, but petitioners did not live up to it. From a legal standpoint it does not aid them to say that there was more work than they supposed, and that, therefore, they could not complete it within the time agreed on. It was their business to have informed themselves before contracting. When the contract time expired and they had failed in their undertaking, they were, in effect, notified by the Council that because of their failure the contract was at an end.

Id.—Id. Whether, under the charter, the Council would have had the power to grant an extension, not determined, for it refused to do so.

Id.—Id. In the face of this refusal, and in the face of the notice from the Council to the effect that the contract was at an end, the petitioners continued the work and completed it. They did so without authority and at their own risk. They were not proceeding in accordance with any contract with the Council, and payment for the work so performed could not be enforced by assessment on the property under the charter. Authority for such assessment must be found in the statute. It is a question of power, and the performance of the work, for which payment is sought, under a valid contract with the city, is one of the prerequisites to its exercise.

Appeal from 17th District Court, Los Angeles County.

King & Chapman, for appellants.

J. F. Godfrey, for respondent.

Ross, J., delivered the opinion of the Court:

In this case it appears that the Council of the city of Los Angeles having determined to grade and otherwise improve a portion of a certain street in that city, called Olive street, entered into a written contract with petitioners in the month of September, 1876, by the terms of which contract petitioners agreed to perform and complete the work on or before the 15th day of November, 1876, for which the Council agreed to pay them at certain rates out of moneys to be collected by assessments to be levied upon the property liable to be assessed for the improvements, pursuant to the charter of the city. It seems that before entering into the contract,

the petitioners talked with the Surveyor of the city in regard to the probable amount of work involved in the undertaking, and that they were informed by him that it would probably involve the removal of about thirty-three or thirty-four hundred cubic yards of earth, whereas, in fact, it involved the removal of about ten thousand cubic yards. But the circumstance that the Surveyor was so much mistaken in his estimate, does not operate in law, to relieve the petitioners of the consequences of their contract, whatever those consequences are. The statute did not devolve on the Surveyor the duty of informing the petitioners in respect to the matter. Before contracting to perform the work within a stated time they ought to have informed themselves in that regard, even if they could not have done so "without taking a good deal of pains."

The work was not completed within the time specified in the contract, and upon its expiration the Council instructed its Clerk to notify petitioners "that their contract for grading Olive street was void for their failure to perform said work." At the same time a petition was presented to the Council by the petitioners, asking an extension of the time for the performance of the work, and this petition was denied. Notwithstanding this, petitioners proceeded with the work and completed it on the 3d of February, 1877.

Subsequently, but at what date does not appear, the petitioners asked of the Council the acceptance of the work; but no other action was taken on the petition than the placing of it on file. Afterwards petitioners demanded of the Council payment for the work, and this demand was referred to the City Attorney. The next step in the proceedings, according to the record, was a report made to the Council May 9, 1878, by the Board of Public Works, to the effect that the work had been well done, that it was more than had been anticipated, and that the Board thought the Council erred in its refusal to extend the time for its completion; that although, in the opinion of the Board, the city was not legally liable, they thought it under the moral obligation to assist the petitioners to obtain pay for the work, and therefore recommended that the assessment be made in accordance with the provisions of the charter in force at the time the work was performed, if the petitioners would agree to hold the city harmless. A motion to carry out this recommendation was adopted by the Council, and subsequently the petitioners executed an agreement to hold the city harmless.

After this, an assessment list of the property fronting on the street where the work was done, was prepared by the

Surveyor with a view to the collection of the money to pay for the work, and this assessment was declared adopted and the clerk instructed to enter it upon the docket of city liens by a vote of six members of the Council—that body then consisting of twelve members, and the minutes not showing that there were any others present at that session than those voting. This action in relation to the assessment was subsequently rescinded, and there the matter rests.

The present proceeding is an application on the part of petitioners for a writ of mandate to compel the Council to proceed and make an assessment on the property fronting on the street improved, for the purpose of collecting the money necessary to pay the petitioners for the work done by them.

By the charter of the city in force when the work in question was performed, the Council was authorized to order the work done and to contract for its performance; but the statute did not provide what the contract should contain. Its language was: "When the resolution of the Council ordering any work to be done has been adopted, the Council may thereafter proceed to advertise, for such time and in such manner as it shall see fit, for proposals to do said work, and for the awarding of such contract as it shall deem best, and not inconsistent with this Act. The Council shall have the right to reject any or all bids, and may readvertise for other proposals. It may let the work in such sections or parcels as it may deem best." (Statutes 1875-6, p. 710, Sec. 6.)

By other provisions of the charter, the Council was authorized to assess upon each lot fronting on the street improved, its proportional share of the cost of the improvement, and to cause such assessment to be entered in the book of city liens, on which—in the event the amount assessed was not paid within five days from the entry in the docket—the Council was authorized to order a warrant to be issued by the Clerk, directed to the Tax Collector, requiring him to levy upon and sell the property to pay the assessment, with costs, etc.

It is perfectly plain from the charter that the Council must have made a contract for the performance of the work, before the property fronting on the street improved could be assessed to pay for the improvement. Such a contract was made, but the petitioners did not live up to it. From a legal standpoint it does not aid them to say, as they do, that there was more work than they supposed, and that, therefore, they could not complete it within the time agreed on. It was their business to have informed themselves before contracting. When the contract time expired, and they

had failed in their undertaking, they were notified by the Council that because of their failure "the contract was void." Of course, in one sense this was not true, for, as said for petitioners, a contract does not become void because of a breach of it. But doubtless what the Council intended by the expression, and what the petitioners understood by it, was, that because of their failure to comply with its terms the Council considered it at an end. That petitioners could not have been misled, is shown by the further fact that at the same session of the Council they asked for an extension of time within which, to complete the work, *and their petition was denied*. Whether, under the charter, the Council would have had the power to grant the extension, need not be determined, for it refused to do so. In the face of this refusal, and in the face of the notice from the Council to the effect that the contract was at an end, the petitioners continued the work and completed it during the following February. They did so without authority and at their own risk. They were not proceeding in accordance with any contract with the Council, and payment for work so performed could not be enforced by assessment on the property under the charter. Authority for such assessment must be found in the statute. It is a question of power, and the performance of the work, for which payment is sought, under a valid contract with the city, is one of the prerequisites to its exercise.

Judgment affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 8354.

DOUGHERTY, RESPONDENT,

VS.

HAGGIN ET AL., APPELLANTS.

DIVERSION OF WATER—VERDICT—DAMAGES—ACTION—EVIDENCE. In an action for the diversion of five hundred inches of water and three thousand dollars damages, a verdict for eight hundred inches and one thousand dollars damages cannot stand.

ID.—ID. In such case the Court cannot remit the excess of the verdict over that prayed, and render judgment for the five hundred inches of the water and one thousand dollars damages.

Id. *Further*: The evidence is insufficient to sustain a verdict, or the judgment, for five hundred inches of the water.

Appeal from Superior Court, Kern County.

Louis T. Haggin, for appellants.

R. E. Arick, for respondents.

Ross, J., delivered the opinion of the Court:

There must be a new trial in this case. The plaintiff, claiming to be entitled to the use of five hundred inches, measured under a four-inch pressure, of the waters of a certain creek in Kern County called Clear Creek, brought this action for the purpose of enjoining the defendants from diverting the said waters, and to recover damages therefor in the sum of three thousand dollars, etc. After trial the jury returned a verdict in these words: "We, the jury, find that the plaintiff is entitled to eight hundred inches, under a four-inch pressure, of the waters of Clear Creek, described in the complaint; and we further find that he has been damaged by the defendants in the sum of \$1,000 by reason of the unlawful diversion of said waters by the defendants.

By this verdict, it will be observed, the jury awarded the plaintiff *three hundred inches more* of the waters than he alleged he was entitled to. His counsel endeavored to obviate this difficulty, however, by offering to remit that excess. His motion to that effect was allowed by the Court below, and judgment was thereupon entered for the plaintiff for five hundred inches of the water, measured under a four-inch pressure, together with one thousand dollars damages.

It is clear that the judgment as entered cannot stand. If the nature of the case admitted of the remitting by the plaintiff of a portion of the water awarded him by the jury, he was not entitled to judgment for one thousand dollars damages. That amount was awarded by the jury, as stated in the verdict, for the diversion by the defendants of *eight* hundred inches of water, measured under a four-inch pressure. How much damage was occasioned the plaintiff by the diversion by defendants of *five* hundred inches, was not determined by the verdict, and can only be determined on another trial, in the event it shall be found that the plaintiff is entitled to that quantity of water.

While we place our decision upon the ground above stated, we think it proper to say—inasmuch as the case must go back for a new trial—that the evidence as presented in the record is not sufficient to sustain a verdict, or the judgment, for five hundred inches of the water in dispute,

measured under a four-inch pressure. Leaving out of consideration entirely the testimony on the part of the defendants (which certainly does not aid the plaintiff), and looking solely at that on the part of the plaintiff, we find nothing to show that the quantity of water appropriated by the plaintiff or his grantor ever amounted to five hundred inches, measured under a four-inch pressure. The tract of land for the benefit of which the appropriation relied on by the plaintiff was made, consists, it appears, of 160 acres. The plaintiff and his predecessor, Chandler, used the water by means of two ditches. Tungate, a witness on behalf of the plaintiff, testified at the trial that the old ditch, which was made prior to 1865, was a small ditch; that in the year named, 1865, Chandler caused a new one to be dug. With respect to the latter, the witness proceeded: "It was a small, irregular ditch, dug in a hurry. I and another man dug it. This was in the latter part of 1865 or the early part of 1866, I think. It was just a small ditch dug with a pick and shovel, and it would run quite a stream of water. It was dug in a great hurry. It was a foot or two wide on top—in some places more, some less. I could not say how much land Chandler had in cultivation—should judge about thirty acres; but I won't be positive at all. A portion of this was his garden spot. This garden spot was moist land and did not require irrigation." This was all that was said by this witness tending to indicate how much water was appropriated by Chandler, or the capacity of the ditches.

Sumner, another witness for the plaintiff, testified with respect to the ditches: "I should judge, if the upper ditch was cleaned out, it would carry a hundred inches; the lower ditch about the same."

The plaintiff, who was the only other witness who testified on his side in regard to the capacity of these ditches, or to quantity of water appropriated by him and his grantor, said: "I have never measured the ditches by the square, or anything of that kind; but I always considered that they were capable of conveying water with a full head from the creek, 1100 inches or 1200 inches. But now I think it would go over 900 inches under a full head from the creek. The ditches take the water from Clear Creek. At the time I purchased the land from Chandler there were two ditches, the upper ditch at the head; at that time I always considered it, as I said, I thought it would be about four feet, and maybe ten or eleven inches deep. I suppose to multiply the depth with the width would give me the inches of water it would carry."

The basis, as given by the plaintiff, for his estimate of the capacity of the ditches in question, namely, the mere multiplication of the width by the depth of the ditches, renders his estimate of no force, and perhaps accounts for the wide difference between his own estimate and that of Sumner. Besides, there is nothing in the testimony as brought here to indicate that the plaintiff or his grantor appropriated the water in controversy to the full extent of the capacity of the ditches.

Judgment and order reversed and cause remanded for a new trial.

I concur: McKinstry, J.

I concur in judgment. McKee, J.

DEPARTMENT No. 2.

[Filed August 29, 1882.]

No. 8394.

GERMANIA BUILDING AND LOAN ASSOCIATION,
APPELLANT,

VS.

JOHN WAGNER ET AL., RESPONDENTS.

MECHANICS' LIENS—MORTGAGE. A mortgage executed subsequent to commencement of furnishing materials, etc., is subject to mechanics' liens. (1186, C. C. P.)

Id.—CONSTITUTION. It was not the intention of the Constitution of 1879 to repeal the existing law, giving liens to mechanics and others upon real property, found in Sections 1183 to 1199, Code Civil Procedure. Such law was preserved by Section 2, Article XXII. The then existing law was in harmony with the Constitution.

Id.—Id. But the Legislature did, under Section 15, Article XX, of the Constitution, pass an Act amendatory of Section 1183, Code of Civil Procedure, intended to enlarge and extend the operation of the former law. (Hittell's Suppt.)

Id.—NOTICES OF LIEN. The notices or claims of lien were filed in time; they sufficiently set forth the contracts upon which they were founded and the parties between whom they were made, as well as the character and quantity of the materials furnished.

Id.—PRACTICE—CROSS-COMPLAINT—APPEAL. The objection that the cross-complaints of defendants, material men, were not served on other defendants, mortgagors: *Held*, not well taken by plaintiff. No appeal was taken by the mortgagors, and plaintiff was not injured by the omission complained of. *Further*, there was no necessity for a cross-complaint. It was charged in the complaint that defendants had or claimed to have some interest in the mortgaged property; and it was sufficient for the defendants to set up that interest by way of answer.

LD.—RECOVERY OF JUDGMENT—WAIVER OF LIEN—ACTION. A mechanic's lien is not waived by commencing and prosecuting to judgment an action against the owner of the property for the indebtedness to secure which the lien was filed.

Appeal from Superior Court, Sacramento County.

P. Dunlap, for appellant.

Alexander, Tyler, Freeman & Bates, Hall, Young & Young, and *Robinson*, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff brought this suit to foreclose two mortgages on certain premises in the city of Sacramento, and made defendants parties, under a general allegation in the complaint, that they have or claim to have some interest in the property, as the holders of mechanics' liens, or otherwise, which interest or claim is subsequent and subordinate to the lien of plaintiff.

It appears from the bill of exceptions that the mortgage first described in the complaint was made on the first day of April, 1881, and the second mortgage was executed on the 19th day of May, 1881.

The allegation in the answer and cross-complaint of the defendant, The Sacramento Lumber Company, is, that the company commenced to furnish materials to be used, and which were used, in the erection of a building on the premises in question on the 18th day of June, 1881, and this allegation is found by the Court to be true.

The allegation in the answer of the defendant Martin is, that he commenced to furnish materials for the building above referred to on the 7th day of March, 1881, and this allegation is found by the Court to be true.

These two liens were held to be prior and paramount to the liens created by the mortgages to the plaintiff; and the correctness of the judgment of the Court below is attacked on this appeal.

When the defendant, The Sacramento Lumber Company, offered in evidence its notice of claim of lien, the following objections were made thereto:

"First—Because there is no law in the State of California to provide for the enforcement of mechanics' liens that have accrued since the adoption of the present Constitution of this State; and because it is irrelevant and immaterial.

"Second—Because it was not filed for record in the County Recorder's office within thirty days after the completion of the contract between the said defendant, Sacramento Lumber Company and the defendants John and

Helena Wagner; and that it does not set forth the contract between the Sacramento Lumber Company and defendants John and Helena Wagner as averred in the Sacramento Lumber Company's cross-complaint. It does not state by whom the contract for the alleged indebtedness was made, and does not state the character of the materials, or the quantity furnished, or to whom furnished. The Court overruled the objections, and the plaintiff then and there excepted;" and the same objection was interposed to the introduction in evidence of the notice or claim of the lien of the defendant Martin.

In answer to the first objection, it is sufficient for us to say that it was not the intention of the new Constitution to repeal or abrogate the then existing law, giving liens to mechanics upon real property, found in Sections 1183 to 1199 of the Code of Civil Procedure; and such law was preserved in full force and effect by Section 1, Article XXII of the Constitution. It is true that Section 15, Article XX of that instrument provides that "mechanics, material men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; and the Legislature shall provide by law for the speedy and efficient enforcement of such liens. It is argued on behalf of appellant "that since the adoption of the Constitution, the Legislature has made no provision for the enforcement of such liens, and that there is no law now in force for that purpose."

If the premises were true, the conclusion would by no means follow, because it was clearly the intent of the Constitution that mechanics and material men should be secured by lien upon the property; and in the absence of any legislation under the new Constitution the laws then in force were kept in force by virtue of Section 1, Article XXII, until altered by the Legislature. The then existing law on the subject was not only inconsistent with anything contained in the Constitution, but was in full harmony with it.

The Legislature in fact did, at the first session after the new Constitution went into effect, pass an Act amendatory of Section 1183 of the Code of Civil Procedure, which was intended to enlarge and extend the operation of the former Act. (Hittell's Suppt. to Codes.) We think that this point is not well taken.

The second objection to the liens is answered by an examination of the notices or claims of lien introduced in evidence. They were filed in time; they sufficiently set forth

the contracts upon which they were founded and the parties between whom they were made, as well as the character and quantity of the materials furnished. The objections were therefore properly overruled by the Court below.

The objection that the cross-complaints were not served on John Wagner and Helena Wagner, and that therefore the Court had no jurisdiction of their persons, is not well taken by the appellant.

No appeal is taken by them or either of them, and we do not see how the appellant has been injured by the omission complained of, or what right he has to urge the objection on this appeal. Again, there was no necessity for a cross-complaint in the case. It was not charged in the complaint that the defendants had, or claimed to have, some interest in the mortgaged property; and it was sufficient for the defendants to set up that interest by way of answer.

From the findings and bill of exceptions it appears that the defendants, whose liens were found to be prior and paramount to the liens created by the mortgages, commenced to furnish materials for the erection of a building upon the mortgaged premises before either of the mortgages was executed; and it is provided by Section 1186, Code of Civil Procedure, that "the liens provided for in this chapter are paramount to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced."

The defendants' liens were properly preferred to, and given priority over, the plaintiff's mortgages.

There is one other point in the case which we will now proceed to consider. The point is thus stated in appellant's brief:

"The defendant, Sacramento Lumber Company, on July 19, 1881, commenced its action in the Superior Court of Sacramento County against the defendants John and Helena Wagner, for the same cause of action and indebtedness set forth in the cross-complaint filed in this action, and on October 24, 1881, recovered judgment in said Superior Court in its said action against the said defendants John and Helena Wagner, for the amount of said indebtedness set out in its said cross-complaint herein, on the merits."

Did the defendant, the Sacramento Lumber Company, waive or lose its lien by commencing and prosecuting to judgment an action against John and Helena Wagner for the indebtedness, to secure which the lien was filed? We are of opinion that the question should be answered in the negative.

In the case of *Crean vs. McFee*, 2 Miles R. 211 (Pa.), it was held that "the taking of a bond warrant of attorney to confess judgment, and judgment confessed therein, does not extinguish the lien of the mechanic or material man under the Mechanics' Lien Act. The lien under the Act is but a collateral security for the debt; the claimant has also a convenient remedy by personal action."

To the same effect in the Thompson case, 2 Brown's (Pa.) Rep. 297. We also find the same doctrine laid down in the very recent work of Kneeland on Mechanics' Liens, Section 151. The author says:

"There are two controlling reasons why a mechanic's lien will not be destroyed by the entry of a judgment. First, because there is merger of the claim and not of the security. The first we have already considered; the second is fully set forth by the Supreme Court of Pennsylvania, in the case of John Thompson, substantially as follows: Whenever the law works an extinguishment, the creditor has gained a higher security; the thing substituted is more beneficial to the creditor than the thing contracted for. Now, the debts of the mechanic or material man were originally simple contract debts, but for their security the Act has created a lien on the building; so that the security which the creditors have in relation to the safety of the debts rank with that of a judgment or mortgage. Therefore the acceptance of a bond and warrant of attorney, and the entering of a judgment on the bond, is not a waiver or extinguishment of a mechanic's lien."

The rule seems to us not only reasonable and just, but in accordance with the analogies of the law in cases of mortgages, pledges, etc., and we have been referred to no authority to the contrary.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed August 30, 1882.]

No. 7782.

McCOY, RESPONDENT, vs. MORRISON, APPELLANT.

TAX DEED—TAX SALE—JUDGMENT—RECTALS—CASES FOLLOWED. *Truman vs. Robinson*, 44 Cal. 623, and *Bronson vs. Caruthers*, 49 Id. 374, followed.

Appeal from Superior Court, San Diego County.

Gatewood & Hotchkiss, for appellant.

Parker & Hunsaker, for respondent.

By the COURT (McKEE, J., dissenting):

Upon the authority of *Truman vs. Robinson*, 44 Cal. 623, and *Bronson vs. Caruthers*, 49 Id. 374, the judgment and order are affirmed.

DISSENTING OPINION.

I dissent: In my judgment the case in hand does not belong to the class of cases covered by *Truman vs. Robinson*, and *Bronson vs. Caruthers*.

McKEE, J.

DEPARTMENT No. 2.

[Filed August 29, 1882.]

No. 8222.

MICHAEL PARKER ET AL., RESPONDENTS,

VS.

THE SAVAGE PLACER MINING COMPANY,
APPELLANT.

MECHANIC'S LIEN—APPEAL—ERROR. Defendant employed one H. to run a tunnel in its mine at a stipulated price, and he employed plaintiffs to perform the work at a stipulated sum per day. H. failed to pay plaintiffs, and they filed their liens. Judgment passed in their favor. Held, on appeal, no error appeared in the proceedings.

Appeal from Superior Court, Sierra County.

Evans, Lindsay & Dickson and Davidson, for appellant.
Cowden, Van Clief, and Soward, for respondents.

By the Court:

In this case the Court below gave judgment in favor of the plaintiffs for certain claims made by them under the mechanic's lien law. It appears from the evidence in the case that the defendant employed one John Hurley to run a tunnel in its mine, at a stipulated price, and Hurley employed the plaintiffs to perform the work upon the tunnel, at a stipulated sum per day. Hurley failed to pay them for such work, and they thereupon filed their liens for the same. Judgment passed in their favor, and we find no error in the proceedings.

Judgment and order affirmed.

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No. 4.

Current Topics.

SPECTATORS AT A PRIZE FIGHT.

In a recent case (*Begina vs. Coney*, 3 Crim. L. Mag. 647) the question as to the liability of spectators at a prize fight was very thoroughly discussed by the Justices of the English High Court. Nine Justices held that spectators at a prize fight were not participants in the fight, and three held that they were. Eleven opinions were filed, all of the Justices but one thinking the matter of sufficient importance to warrant separate opinions. This, of course, settles the law in Great Britain, and gives a great stimulus to the "manly art." In the United States, however, this decision simply amounts to reasoning of high authority. The two most distinguished members of this Court, Baron Pollack and Lord Chief Justice Coleridge, were in the minority. The argument of the Chief Justice, we think, is unanswerable. He says: "In such a case as this the spectators really make the fight; without them, and in the absence of any one to look on and encourage, no two men, having no cause of personal quarrel, would meet together, in solitude, to knock one another about for an hour or two. The brutal effects of prize fights are chiefly due to the crowd who resort to them." In reply to the distinction drawn by the majority of the Court between those who keep the ropes, collect contributions, and those who simply look on, he says: "The man who keeps the ropes, or goes around to collect contributions, no more really assaults any one than a mere spectator. Once granted that an actual physical participation in the assault is not necessary, it seems to me that there is no legal principle in distinguishing between one set of spectators and another." In reply to an analogy drawn by the majority between a crowd gathered around a prize fight and an assemblage in a street witnessing the commission of a crime, Baron Pollack very ably repeats: "In the one case it is usually the bystanders collected around who create and are responsible for the fight, as a matter of

interest and amusement to themselves. In the other, unless there be some overt act by gesture or word which denotes assistance or encouragement, it would be contrary to all reason to infer that the bystanders were taking any part in the illegal act." This reasoning we think conclusive, and sufficient to overcome the effect of the large vote of nine to three, when the decision shall be cited as authority in the Courts of this country.

WHEN MUST A BILL OF EXCEPTIONS BE SETTLED ?

This current topic is suggested by an apparent conflict between two late decisions of our Supreme Court.

In *Levee District vs. Huber*, 57 Cal. 42 (7 Pac. C. L. J. 165), it was held (Department One) that a proposed bill, containing a certain exception, was presented too late, because not presented until more than three months after the ruling or decision was made. The exception had been taken to a ruling of the Court striking out a portion of defendant's answer. It does not appear how long this settlement was after the entry of the judgment, or notice thereof. This decision was based on Section 649, Code of Civil Procedure, which provides that a bill of exceptions *may* be presented for settlement at the time the decision is made.

In *Tregambo vs. Comanche M. and M. Co.*, 57 Cal. 501, (7 Pac. C. L. J. 636,) the Court in bank virtually overruled the above decision. It does not seem to have been called to their attention, although the Chief Justice took part in both decisions.

In this latter case it was claimed that a bill containing an exception to a ruling, refusing to set aside a default, was too late because not presented until more than twenty-nine days after this ruling (more than twenty days after the judgment.) The Court held that, though the bill *may* be presented at the time of the ruling, it could be exercised at any time prescribed by Section 650 of the Code of Civil Procedure. This Section allows ten days after entry of *judgment*, on motion thereof, for the preparation of a draft of a bill, ten days for preparing amendments by adverse party, and ten days thereafter for the presenting of the bill to the Court for settlement.

In the department decision, Section 649 was construed as amendatory. In the subsequent bank decision, it is construed as merely directory.

Supreme Court of California.

IN BANK.

[Filed August 30, 1882.]

No. 10,668.

PEOPLE, RESPONDENT, vs. MORINE, APPELLANT.

CRIMINAL LAW—INSTRUCTIONS—APPEAL—ERROR. The judgment in a criminal case will not be reversed because of error in an instruction, where it appears from the whole charge that the point involved in the erroneous instruction was properly presented in another portion of the charge.

ID.—ID. If other instructions are given which qualify and explain an objectionable instruction, the whole charge will be considered; and if, as a whole, it correctly presents the law applicable to the case, the judgment will not be reversed.

ID.—ID. It is not necessary that each instruction should fully state the law of the case; an instruction may be helped out and explained by another on the same point. In such case the Court will look to all the instructions *in pari materia* for the purpose of determining whether the law has been correctly given to the jury.

EVIDENCE—WITNESS—DEPOSITION—REPORTER'S NOTES—CERTIFICATE. Defendant offered and read a portion of a deposition from the reporter's notes, sworn to be correct, for the purpose of impeaching a witness on a former trial. *Held*, the prosecution was entitled to introduce the part of the deposition corroborating the witness, notwithstanding defendant's objection that the notes were not properly certified.

ID.—Drunkenness. The refusal of the Court to allow an answer to a question as to drunkenness of another witness, *held*, not prejudicial to defendant, because the witness questioned subsequently testified fully on the subject.

Appeal from Superior Court, Yolo County.

Bridgford & Ball, for appellant.

Starr, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The first error assigned on this appeal, is founded upon the following instructions given to the jury, which, it is claimed by the defense, were erroneous:

1. "To justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing, that in order to save his own life, or to prevent his receiving great bodily harm, the killing of deceased was absolutely necessary; and it must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow is given."

2. "To constitute murder in the first degree it is only necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer. There need be no appreciable space of time between the intent to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind."

3. "The killing being shown in a given case, if it appears that the killing was wilful, deliberate and premeditated, it constitutes murder in the first degree."

The objection made to the first instruction referred to above is, that the jury were told that the defendant had no right to act upon an apparent necessity, but the necessity must have been actual; and that it entirely ignores the well-settled doctrine that a defendant in a criminal case is justified in killing his assailant, when the facts and circumstances connected with the homicide are of such a character as to create a *reasonable and well-founded belief* of actual danger and necessity. It is claimed that the instruction given was disapproved by this Court in the case of *People vs. Flahave* (8 Pac. C. L. J., 47), and it may be conceded, for the purpose of this case, that the position taken by the learned counsel for the defense is correct. But it does not follow therefrom that the judgment of the Court should be reversed. If other instructions were given which qualify and explain the objectionable instruction, the whole charge will be considered, and if, as a whole, it correctly presents the law applicable to the case, the judgment will not be reversed. In other words, it is not necessary that each instruction should *fully* state the law of the case; but an instruction may be helped out and explained by another, on the same point; and in such a case the Court will look to all the instructions *in pari materia* for the purpose of determining whether the law has been correctly given to the jury.

In the case of *People vs. Bagnell*, 31 Cal. 409, it was held that in order to determine the correctness of the charge of the Court to the jury in a criminal case, its different parts must be considered in their relations to and with each other. In the case of *People vs. Dennis*, 39 Cal. 629, the Court says: "The defendant is not prejudiced by instructions, some portions of which, taken by themselves, may be objectionable, but, as subsequently qualified, embrace a correct exposition of the law upon the points presented." And in the case of *People vs. Cleveland*, 49 Cal. 577, the law on this subject is stated as follows: "While some of the instructions are perhaps subject to criticism, and may not state

the law with precise accuracy, yet, taken as a whole, they were substantially correct, and could not have misled the jury to the prejudice of the defendant." There is another case on this subject, in which we find the following language of Mr. Justice McKinstry, in delivering the opinion of the Court: "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." (*People vs. Doyell*, 48 Cal. 85.)

We will proceed to examine other instructions given by the Court on the question of justifiable homicide, and see if they did not, as a whole, correctly present to the jury the law on that subject. Instruction 4 given by the Court to the jury is in the following language:

"Homicide is justifiable when committed by a person in either of the following cases:

"1. When resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person. * * *

"3. When committed in the lawful defense of any such person, or of a wife or husband, parent, child, master, mistress or servant of such person, where there is *reasonable ground* to apprehend a design to commit a felony or to do some great bodily injury, etc. * * * A bare fear of the commission of any of the offenses mentioned in the second and third subdivisions of the last instruction, by Gardner, to prevent which the defendant would have been justified in inflicting the wound on Gardner, is not sufficient to justify defendant. But the circumstances must have been sufficient to have *excited the fear of a reasonable person*, and defendant must have acted under the influence of such fear."

Instruction 15: "A man cannot, in any case, justify killing another by a pretense of necessity, unless he was wholly without fault in bringing about that necessity. A man has a right to defend himself against a sudden and unexpected assault by another; but if that assault does not seriously injure him, or contain in itself circumstances of imminent danger or injury to him, and the circumstances in which he is placed by it are insufficient to *justify him in the belief* that such danger exists, he has no right to take advantage of the opportunity, which such an assault gives him, to slay his assailant."

The foregoing instructions were given at the instance of

the prosecution, and, afterwards, the following on the same subject were given at the request of the defendant:

"If you find from the evidence that the defendant inflicted a wound upon deceased, from which deceased died, and that such wound was inflicted by defendant in the lawful defense of his person, or when there was *reasonable ground* for defendant to apprehend a design on the part of deceased to do defendant some great bodily injury, and imminent danger of such design being accomplished, then the jury are instructed that defendant was justifiable, and you must find him not guilty."

"The jury are instructed that in determining the question as to whether there were *reasonable grounds* for the defendant to *believe* that the deceased intended to inflict some great bodily injury upon the person of the defendant, they should not only take into consideration all the circumstances surrounding the difficulty which resulted in the death of the deceased, but they should also consider any feelings or bitter enmity on the part of deceased towards the defendant, and which defendant knew to exist; and also any threats of violence that may have been made by deceased against defendant, and which had been communicated to defendant."

"The jury are instructed that if the deceased assaulted the defendant under such circumstances as to *create a reasonable apprehension* that he, the defendant, was about to suffer great bodily injury, the defendant had a right to act upon such *appearances* and to kill the deceased if necessary to avoid the *apprehended danger*, and under such circumstances the killing would be justifiable, although it might afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done."

Applying the above rule, well established by the decisions in this State, to the charge given by the Court in this case, we find that as a whole it correctly presents the law of justifiable homicide, although it may be admitted that one instruction, standing alone, does not "contain all the conditions and limitations which are to be gathered from the entire text." And the same may be said with reference to the other two instructions to which our attention has been directed. The instructions omitted the element of *malice*, and spoke of a killing, wilful, deliberate and premeditated; but the Court, in its definition of the crime of murder, told them that the killing must be with malice, in order to make it murder.

2. The next point relates to the admission in evidence of the reporter's notes. It is claimed on behalf of the defend-

ant that the notes of the short-hand reporter were not certified as correct. It appears, however, from the transcript in the case, that the reporter was called as a witness *by the defendant*, and upon his examination in chief testified, that he took down the testimony of Britt in short-hand and transcribed it into long-hand; that "the paper" (his notes of the evidence) "was a correct transcript of G. L. Britt's testimony as given in the last trial in Colusa." An effort had been made by the defense to impeach the witness Britt by showing that he had testified on a former trial of this case to a state of facts different from that stated by him on the second trial. This testimony of the reporter (Transcript, p. 74,) was given on the part of the defendant in making out his defense, and a portion of the deposition referred to by said reporter was used by the defendant for the purpose of showing that the witness Britt had made a different statement in some points from that made upon the present trial; but such deposition was not used nor was any portion of it introduced by the defendant upon the points in reference to which the witness DeLap (the impeaching witness) testified. Thereupon the prosecution "offered the deposition on the point as to the moving off from the east end of the bar, as to the position the parties occupied, and the prosecution was permitted to read in evidence that part of the deposition which tended to contradict DeLap, and to corroborate the witness Britt's statement on this trial." It will appear from an examination of the evidence of the witness DeLap, found in the transcript, that he testified to what the witness Britt swore to on the former trial in reference to the position of the parties, the deceased and the defendant, and their movements at the time the homicide was committed, and it was that part of the deposition of Britt which related to these facts, that the prosecution was allowed to read in evidence. In this we think there was no error.

3. The third alleged error grows out of the refusal of the Court to permit the witness Cunningham to answer the following question:

"I will ask you if, in your opinion, Waite was in a condition to intelligently see any difficulty and afterwards relate it?"

The witness Waite had been called for the prosecution and had testified to the circumstances attending the homicide, and Cunningham had testified that he had a great deal of experience with drunken men. The question was objected to by the prosecution, and the objection was sustained by the Court.

It is not necessary for us to determine how far the testimony of experts is admissible on the question of drunkenness, or whether the particular question objected to was a proper one or not, for the simple reason that the defendant was not injured by the refusal of the Court to allow the question, as will appear from an examination of the transcript. Cunningham was asked: "What was his condition for sobriety? Ans.—I considered him drunk. Q.—How drunk? Ans.—So drunk I could get nothing from him in the case at all. Q.—What effort did you make to find out from Waite what had occurred there? Ans.—I considered him so drunk that I did not make much effort. I did not consider I could find out much from him. Q.—You undertook to talk with him, and found him drunk? Ans.—Yes, I went up to the bar; he was there and had his hands on his chin."

What has been said with reference to the witness Waite, applies with equal force to the witness Watkins. Cunningham testified fully as to the condition of each of them, and if he had been allowed to answer the questions objected to no greater weight would have been imparted to his evidence. Conceding, therefore, for the purpose of the argument, that the witness should have been permitted to answer the questions objected to, we are clearly of the opinion that the defendant's case was not prejudiced by the action of the Court in sustaining the objections to them.

The record shows no error for which the judgment should be reversed, and the judgment and order are affirmed.

We concur: McKee, J., Thornton, J., Ross, J., Myrick, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed August 22, 1882.]

No. 8134.

CARPENTER ET AL., RESPONDENTS,

VS.

NATOMA WATER AND MINING COMPANY,
APPELLANT.

STATUTE OF LIMITATIONS—FORMER ACTION—DEFENSE—EJECTMENT. The bringing of an action of ejectment and the recovery of a judgment, does not affect the right of a defendant to avail himself of the statute of limitations in another action subsequently brought, between which two actions there is no connection except that they relate to the same subject-matter and are between the same parties or their privies.

Id.—Id. The present action is not founded upon the judgment in the former case, and no allusion is made to it in the complaint herein.

Appeal from Superior Court, El Dorado County

A. P. Catlin, for appellant.

G. J. Carpenter, for respondents.

Morrison, C. J. delivered the opinion of the Court:

Plaintiffs brought an action against defendant for the recovery of certain land described in the complaint, and defendant interposed as a defense to the action, the plea of the statute of limitations. The case comes up on the judgment roll, and it will be sufficient for us to refer to some of the findings filed by the learned Judge before whom the trial was had.

"In the early part of the year 1851, the line of the canal mentioned in the pleadings was surveyed and located on the lands sought to be recovered in this action; and that during the years 1851 and 1852 was being excavated by the defendant; and that the canal was completed through said lands about the first of March, 1853, and has ever since been continuously used and possessed by defendant for running water therein. That the land over and all through which said canal was constructed was vacant, unclaimed public land of the United States Government."

"That said canal is about twenty-five miles in length, with several branches; and ever since its construction has been claimed by the defendant as its property, and so continuously held and used. That the premises described in plaintiffs' complaint were at the time said canal was located and constructed, and for a long time thereafter, public lands, belonging to the Government of the United States."

"That for more than twenty-six years before the commencement of this action, the part or portion of the lands described in plaintiffs' complaint as passed over and occupied by said canal of defendant, was in the continued, uninterrupted, absolute, peaceable and exclusive possession of defendant, except as interrupted by the suit brought by plaintiffs' predecessor in interest, B. N. Bugby, to recover possession of said premises, as in the findings hereinafter set forth. That defendant claimed title thereto adverse to plaintiffs and all other persons, and that during all this time defendant was running water through said canal, and exercising dominion and control over the whole thereof, and running water therein for the purposes aforesaid."

"That defendant's right to the use of the land sued for in

this action, for the purposes of furnishing water for mining, agricultural, domestic, and other uses and purposes during all the time since the construction of said canal, has been uniformly acknowledged and recognized by the local customs and decisions of the Courts of this State and the United States, except in the suit brought by plaintiffs' predecessor in interest, B. N. Bugby, against defendant, to recover possession of said land and premises, as hereinafter in these findings set forth."

"That on the 22d day of April, 1867, the State of California, under the provisions of an Act of the Congress of the United States, entitled 'An Act to provide for the survey of the public lands of California, the granting of pre-emption rights therein, and for other purposes,' approved March 3, 1853, and in accordance with the various Acts of the Legislature of said State preceding said 22d day of April, 1867, did by letters patent grant and convey to B. N. Bugby, the plaintiffs' predecessor in interest, the tracts of land located and described as follows, to wit: The southeast quarter, and the east half of the southwest quarter, and the northwest quarter of the southwest quarter, all of Section No. 16, Township No. 10 north, range No. 8 east, Mount Diablo base and meridian, together with all the privileges and appurtenances thereunto belonging and appertaining."

By the twelfth finding it appears that Bugby (under whom plaintiffs derive title), commenced an action similar to the present, on the 16th day of April, 1868, and recovered a judgment therein in the District Court in April, 1873; that an appeal was taken to the Supreme Court and the judgment was affirmed on the 30th day of April, 1875; that thereupon an appeal was taken to the Supreme Court of the United States, and by that Court the judgment of the Supreme Court of the State was affirmed in the year 1878.

The complaint now before us was filed on the 18th day of February, 1880. There is but one question in the case, and that is, were the plaintiffs barred by the statute of limitations? If not, it is very clear that the judgment was correct, and should be affirmed. Was this statute saved by the bringing of the action of Bugby against the defendant? The present action is not founded upon the judgment in the Bugby case, and no allusion is made to such judgment in the complaint filed in this case. It is well settled that any interruption in the statute of limitations stops its running and establishes a new date from which it again begins to run. But does the bringing of an action and the recovery of a judgment affect the right of the defendant to avail himself of the

statute as a defense in another action, between which two actions there is no connection except that they relate to the same subject-matter and are between the same parties or their privies?

In his argument the learned counsel for the defense very pertinently says: "This action is not an action in aid of the judgment put in evidence, nor a proceeding to procure the execution of that judgment." The present action is not a continuation of the former one, and is in no measure connected with it. It is a separate and independent proceeding which could have been as well maintained without, as with reference (by evidence or otherwise) to the first action and judgment therein, and the plaintiff as fully established his right to a recovery after he had introduced his patent in evidence, as he did by superadding proof of a judgment in the case of Bugby, referred to above.

Our attention has not been called to any case which conflicts with the views above expressed, and we are not aware of any. The California cases referred to by the learned counsel for plaintiffs are not in point.

Judgment reversed.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed August 25, 1882.]

No. 7815.

STRONG, RESPONDENT,

vs.

PLACERVILLE R. R. CO., APPELLANT.

NEGLIGENCE—RINGING OF BELL—LOCOMOTIVE—DAMAGES. Action to recover damages for injuries resulting from the negligence of defendant, whereby plaintiff's team was frightened, resulting in the injuries to plaintiff complained of. *Held*: The evidence tended to prove that the injury complained of was the direct result of the omission to ring the locomotive bell as required by the statute (486, C. C.).

ID.—NONSUIT—NEW TRIAL. The question whether plaintiff was so plainly guilty of contributory negligence as that the Court below should have granted a nonsuit, or new trial, is to be determined—as such questions must always be determined—by the particular circumstances of the case.

ID.—ID. Plaintiff had a right to drive upon M street, Sacramento, and to cross the track at the foot of that street, provided he adopted every reasonable precaution against injury from moving trains. There was evidence that M street was built up on each side, and lined with piles of lumber in such manner as that a train upon the track could not be seen until plaintiff approached very near to the track.

- Id.—Id.** Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing. In the legal sense he was innocent of negligence unless there was a want of ordinary care and prudence on his part.
- Id.—Id.—CONTRIBUTORY NEGLIGENCE.** The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury, will prevent a recovery; but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover.
- Id.—Id.** The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land. It cannot be imputed as negligence in plaintiff that he did not anticipate culpable negligence on the part of the employees of defendant. It was not the duty of plaintiff to stop, fasten his horse at some point considerably distant from the track, and from thence to make a reconnaissance of the situation *afoot*.
- Id.—Id.—VERDICT—INSTRUCTION.** The verdict does not prove that the jury disobeyed an instruction given at defendant's request, because they may have found that plaintiff could not have heard the approach of a locomotive or train had his horses been walking.
- Id.—Id.** If there is imminent danger of a collision, which might be avoided by stopping or slowing a train, the engineer cannot justify himself in driving his engine upon a wagon and horses under the plea that the driver should have kept out of the way.
- Id.—Id.** The jury had been told, in effect, that if plaintiff could have heard the locomotive in time to avoid the consequences which followed, he was guilty of contributory negligence. This charge was more strongly in favor of defendant, than if they had been told that he should give way to the locomotive after he saw or heard it.
- Id.—Id.** It cannot be said that plaintiff ought not to have recovered, if, by reason of the carelessness of the engine-driver and without any want of prudent care on his part, he found himself in such close proximity to the locomotive as that his team, composed of horses ordinarily well-broken, and of ordinary gentleness, frightened and ran. All the circumstances were to be considered by the jury.
- Id.—Id.** The proposition that plaintiff ought not to recover unless the locomotive, or some part of the train, came into actual contact with his horse or vehicle, cannot be maintained.
- NEW TRIAL—CONFLICT OF EVIDENCE.** An order denying a motion for a new trial will not be disturbed where there is a substantial conflict in the evidence.

Appeal from Superior Court, Sacramento County.

T. B. McFarland, for appellant.

Cadwalader, Devlin, and Hopper, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

There was certainly a very substantial conflict in the evidence with reference to negligence on the part of the defendant, and the Court below denied a motion for a new trial.

The question whether plaintiff was so plainly guilty of contributory negligence as that the Court below should have granted a nonsuit, or new trial, is to be determined—as such

questions must always be determined—by the particular circumstances of the case. Plaintiff had a right to drive upon "M" street, and to cross the track at the foot of that street, provided he adopted every reasonable precaution against injury from moving trains. There was evidence that "M" street was built upon each side, and lined with piles of lumber in such a manner as that a train upon the mile track could not be seen until plaintiff approached very near to the track. What should he have done to avoid the imputation of negligence? The engine bell was not rung as required by Section 486 of the Civil Code. This must be assumed in this Court because there was testimony to that effect. Nor can it be presumed, as against the verdict, that the noise of plaintiff's wagon, as his horses were proceeding upon a "slow trot," would have prevented his hearing the bell, had the bell been rung. Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing. In the legal sense, he was innocent of negligence, unless there was a want of ordinary care and prudence on his part. The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover. (*Robinson vs. W. P. R. R. Co.*, 48 Cal. 423.) A very timid or cautious person would not, perhaps, have driven in the direction of the railroad, knowing that a train *might* pass along the track, and that the warning bell might not be sounded. But the question is: Did the plaintiff exercise ordinary care and prudence in doing what he did? The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land. Plaintiff was authorized to assume that all other persons using the street would do so with due care. It cannot be imputed as negligence that he did not anticipate culpable negligence on the part of the employees of defendant. (*Shearman & Redfield*, Sec. 31.) He had a right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine bell. He would have had no right to close his eyes, had he been in a position to see the track; but, as already stated, the evidence shows that he could not look up and down the track, because of the intervening buildings and

lumber, until he reached a point very near it. Had he been where the track was ordinarily visible, but some transitory obstacle impeded his vision, as the clouds of dust in *Fleming's* case (48 Cal. 253)—it might have been his duty to wait until the obstacle was removed. But here plaintiff's view was cut off by permanent erections; he certainly had the right to use the street. We cannot say that it was his duty to stop, fasten his team at some point considerably distant from the track, and from thence make a reconnoissance of the situation *afoot*. Whether plaintiff was properly cautious after he reached a place from which he could see the track was a question of fact as to which we cannot say the jury found wrongly.

Of course our conclusion assumes the facts to have been as testified to by plaintiff and his witnesses, since the only point, to be considered here, is whether the question of contributory negligence should have been taken away from the jury or a new trial granted.

Appellant argues that the jury disobeyed the eleventh instruction given at the request of defendant's counsel. The verdict does not prove this, because the jury may have found that plaintiff could not have heard the approach of a locomotive or train had his horses been walking.

The general statement in the fifth instruction asked for by defendant's counsel, is taken from *Shearman & Redfield* (Sec. 481.) Separated from the context, however, it might have misled the jury, and the Court below was justified in refusing it. As offered, it might have been applied to the question of negligence on the part of *defendant*. If there is imminent danger of collision, which might be avoided by stopping or slowing a train, the engineer cannot justify himself in driving his engine upon a wagon and horses, under the plea that the driver should have kept out of the way. The case shows no *contest* for the right of way. The jury had been told in effect that if plaintiff could have heard the locomotive in time to avoid the consequences which followed, he was guilty of contributory negligence. This charge was more strongly in favor of defendant than if they had been told that he should give way to the locomotive after he saw or heard it.

The sixth instruction asked by defendant was to the effect that plaintiff could not recover if his horses were frightened by the appearance of the locomotive, or the ordinary sound of its passage. The instruction ignores the other circumstances of the case. We cannot say that the plaintiff ought not to have recovered, if, by reason of the carelessness of

the engine-driver and without any want of prudent care on his own part, he found himself in such close proximity to the locomotive, as that his team, composed of horses ordinarily well broken, and of ordinary gentleness, were startled, frightened, and ran. All the circumstances were to be considered by the jury. The seventh instruction goes to the extent of declaring that plaintiff ought not to recover unless the locomotive, or some part of the train, came into actual contact with the horses or vehicle. This proposition cannot be successfully maintained.

Hasket vs. Indianapolis R. R. Co., 10 Ind. 409, cited by appellant, was a case in which it was held, that, under a *statute*, which for the recovery of the value of any animal killed or injured "by the cars or locomotive, or other carriages" used on a railroad, no recovery could be had unless the animal was struck by a car, locomotive, or carriage; the Court saying, the words to the *statute*, in their ordinary import involved an actual collision. In *Burton R. R. Co.*, 4 Harrington, 452, also cited by appellant, it was only said that plaintiff could not recover unless defendant was guilty of negligence. The *head-note* should be read in connection with the statement of facts and opinion.

In the case before us the evidence certainly *tended* to prove that the injury was the direct result of the omission to ring the bell as required by the statute.

We can see no contradiction between Instruction 7 given at the request of plaintiff, and Instruction 7 given at the request of defendant. Nor is there any substantial contradiction between No. 7 given for plaintiff, and No. 11 given for defendant.

The Court did not err in overruling the demurrer to the amended complaint.

Judgment and order affirmed.

I concur: Myrick, J.

I concur in the judgment. McKee, J.

IN BANK.

[Filed August 25, 1882.]

No. 10,719.

PEOPLE, vs. ALECK, ALIAS JIM FARLEY.

DISTRICT ATTORNEY—VENUE—NOTE. (The opinion referred to in the note of the Court, is found in 9 Pac. O. L. J. 807.)

NOTE.—In the transcript in this case it did not appear

that on the trial the venue was proven, and this was one of the grounds for reversal. We took occasion to criticize the fact as an omission, either to prove the venue or to have the fact of proof inserted in the bill of exceptions. Since the decision of the case by us, we have inspected the original bill as settled and have placed on file a certified copy, from which it appears that the venue was proven; and it appears that the omission arose from mistake in making and certifying the transcript.

We make this statement in justice to the District Attorney of Amador County, and to relieve him from the implied imputation of carelessness.

IN BANK.

[Filed August 30, 1882.]

No. 10,757.

PEOPLE, RESPONDENT, vs. LEWIS, APPELLANT.

BURGLARY—INFORMATION. An information for burglary charging the crime in the language of the statute is sufficient.

ID.—VERDICT—EVIDENCE. The evidence justified the verdict.

Appeal from Superior Court, Tehama County.

J. F. Ellison, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The defendant was convicted of the crime of burglary, and on this appeal the first point made by him is, that the information is insufficient. The point is not well taken. The information charges the crime in the language of the statute, and is sufficient. (Penal Code, Sec. 459; *People vs. Shuber*, 32 Cal. 36; *People vs. Martin*, Id. 91; *People vs. Cronin*, 34 Id. 191.)

The objection that the evidence is insufficient to justify the verdict cannot be sustained. There is no doubt from the evidence that a burglary was committed, and the circumstances proved were sufficient to justify the jury in finding the defendant guilty of the crime.

There is nothing in the case to call for a reversal of the judgment, and the same, as well as the orders denying defendant's motion in arrest of judgment, and for a new trial, are affirmed.

IN BANK.

[Filed August 30, 1882.]

No. 10,758.

PEOPLE, RESPONDENT, vs. LEWIS, APPELLANT.

INFORMATION—EVIDENCE. The information was sufficient. Case 10,757, same defendant.

ID. The evidence was sufficient to justify the verdict.

ID.—NEWLY DISCOVERED EVIDENCE—DILIGENCE. As to newly discovered evidence, the case does not show the requisite amount of diligence.

Appeal from Superior Court, Tehama County.

J. F. Ellison, for appellant.*Attorney-General Hart*, for respondent.

By the COURT:

The information was substantially the same in this case that it was in case No. 10,757, against the same defendant, and what we said about the information in that case is applicable to this.

The evidence was sufficient to justify the verdict, and we will not disturb it.

The Court did not err in denying the defendant's motion for a new trial, on the ground of newly discovered evidence. The case does not show the requisite amount of diligence.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed September 4, 1882.]

No. 10,773.

IN RE W. F. STUART ON HABEAS CORPUS.

LICENSEE—ORDINANCE—RETAIL LIQUOR DEALERS—SAN FRANCISCO. The Board of Supervisors of the city and county of San Francisco had ample power, July 8, 1880, to pass an ordinance licensing the sale of liquors by retail.

ID.—CONSTITUTION. Conceding that all Acts in relation to the licensing of liquor dealers were repealed by the Act of 1878 (Stats. 1877-8, p. 444,) the power to pass Section 39 of Order 1589 existed under Section 2 of Article XI of the Constitution of 1879, which *per se* confers the power on the Board of Supervisors to pass such section.

Pringle and Bryant, for petitioner.*E. D. Sawyer*, for respondent.

By the COURT:

The petitioner Stuart was convicted in the Police Judge's Court of the city and county of San Francisco, of a misdemeanor in violating Section 39 of Order 1589 of the city and county of San Francisco. The section referred to, regulates and fixes the amounts to be paid for licenses for selling spirituous, malt, or fermented liquors or wines, etc., in less quantity than a quart, in the city and county of San Francisco. A violation thereof is a misdemeanor. Under the judgment in this case the petitioner was imprisoned.

The power to pass this ordinance was ample under the fourth subdivision of the first section of the Act of April 25, 1863, (see Statutes of 1863, p. 340;) and the third section of the Act of March 30, 1872, (Statutes of 1871-2, p. 737.) The order above mentioned was passed July 28, 1880. Further, ample authority to enact this order is found in the eleventh section of Article XI of the Constitution of 1879.

That the order in question is a police regulation is, we think, settled by the judgment of this Court in *Ex Parte Ah Toy*, 57 Cal. 92. We are aware of no general law in conflict with the order.

Conceding that the Act of 1871-72, and all other Acts in relation to the licensing of liquor dealers, was repealed by the Act of 1878, (Statutes of 1877-78, p. 444,) the power existed under the section of the Constitution referred to, which *per se* confers the power on the Board of Supervisors of the city and county of San Francisco to pass the section of Order 1589, above mentioned.

The petitioner is remanded to the custody of the Sheriff of the city and county of San Francisco.

IN BANK.

[Filed August 30, 1882.]

No. 7955.

DU PRAT, APPELLANT, vs. JAMES ET AL., RESPONDENTS.

MINING CLAIM—EJECTMENT—FINDING—ACT OF CONGRESS OF MAY 10, 1872.

In ejectment for a mining claim, defendants averred in their answer that plaintiff had not complied with Section 5 of the Act of Congress of May 10, 1872, "to promote the development of the mining resources of the United States," in not performing the labor or making the improvements on said claim as required by said Act. *Held*, read in connection with the allegation as to entry and location on the part of defendants, this averment is to be treated as denied by plaintiff, and the Court should have found on such material issue.

Appeal from Superior Court, Tuolumne County.

*Rodgers, Redmond, and T aylor & Haight, for appellant.
Street & Street, for respondents.*

By the COURT:

In their answer the defendants aver that plaintiff "has not complied with Section 5 of the Act of Congress, approved May 10, 1872, entitled an 'Act to promote the development of the mining resources of the United States,' in not performing the labor or making the improvements on said claim as required by said Act." Read in connection with the allegation as to entry and location on the part of defendants, this averment is to be treated as denied by plaintiff. Thus was created a material issue (*Morenhaut vs. Wilson*, 52 Cal 263,) and the Court below failed to find upon it.

Judgment reversed and cause remanded for a new trial.

DEPARTMENT No. 1.

[Filed August 25, 1882.]

No. 8086.

BECKMAN, APPELLANT, vs. WILSON, RESPONDENT.

AGENCY—POWER—DESTRUCTION OF BUILDING—REPAIR OF PREMISES—FIRE—

MORTGAGE. Defendant, a mortgagee in possession, appointed plaintiff her agent for the purpose of collecting rents, paying taxes, insurance, and interest on a prior mortgage held by one Anderson, and requested plaintiff to take care of the property "as if it were his own," and at the same time instructed him to incur no expense on said property that could be avoided, and stated that she did not wish to expend any money thereon, but wished the proceeds of the rents thereof to be applied to the payment of her loan. The destruction of the improvements by fire and their rebuilding was not then in contemplation of either party. *Held*, plaintiff had no authority under the agency to purchase and take an assignment of the prior mortgage, contract with the mortgagor that he should look to him for, or tack upon the prior mortgage the amount he should expend in rebuilding the property destroyed by fire, and then assert a claim against defendant for the same amount. The property plaintiff was to take care of was defendants' mortgage lien to the extent of \$2,000.

- 1b.—1b. It was not the duty of defendant nor of plaintiff as her agent, to rebuild the improvements destroyed by fire, nor to make other permanent improvements, but only to make such repairs as were necessary to preserve and protect the property from ordinary wear and tear.
- 1b.—1b. The agency of plaintiff cannot be construed so as to authorize him to borrow for defendant, of himself or anybody else, moneys to be applied in rebuilding or making new and permanent improvements.
- 2b.—1b. The prohibition as to expending money on the property, must be held to be a prohibition upon the expenditure of any other money than such as the law made it her duty to expend, and, to that extent, at least, the language is a limitation upon the power.

Id.—Id. Further, if it be admitted that plaintiff had such power, he did not exercise it. On the contrary, he expended the money in rebuilding and making other permanent improvements for his own benefit and that of the mortgagor, by whom he was to be repaid the same, with interest.

Appeal from Superior Court, Sacramento County.

A. L. Hart, for appellant.

Dunlap & Van Fleet and Freeman & Bates, for respondent.

By the COURT:

There was a substantial conflict in the evidence, and we cannot say that the evidence did not sustain any one of the findings.

Taking the widest view of the agency conferred upon plaintiff by the defendant, Ellen Wilson, mortgagee in possession, he had no authority to purchase and take an assignment of a prior mortgage, contract with the mortgagor that he should look to him for or tack upon the prior mortgage the amount he should expend in rebuilding the property destroyed by fire, and then assert a claim against defendant for the same amount. This was not "taking care of her property as if it were his own." The property he was to take care of was her lien to the extent of two thousand dollars. The power is to be construed with reference to the subject-matter, and all the words used in conferring it are to be considered in ascertaining the authority conferred. He was told in effect, "not to expend any money thereon, but apply the proceeds of the rents to the payment of her loan." It was not the *duty* of defendant, Ellen, nor of plaintiff as her agents, to rebuild the improvements destroyed by fire, nor to make other permanent improvements, but only to make such repairs as were necessary to preserve and protect the property from ordinary wear and tear. If she had *power* to expend the amount received for rents in rebuilding and making permanent improvements, or even to expend more money for such purposes than the amount received for rents, he had no authority to do so much. His agency cannot be construed so as to authorize him to borrow for her, of himself or anybody else, moneys to be applied in rebuilding or making new and permanent improvements. (Jones on Mort. Vol. 2, Sec. 1126, *et seq.*; Thomas on Mort. 83-4; Coote, 746.) He was expressly prohibited from spending any money on the property, which must be held to be a prohibition upon the expenditure of any other money than such as the law made it her duty to expend, and to that extent, at least, the language is a limitation upon the power.

Even, however, if it be admitted that he had the power, he did not exercise it. On the contrary, the finding is that he expended the money in rebuilding, and making other permanent improvements, for his own benefit and that of the mortgagor, by whom he was to be repaid the same, with interest.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed August 30, 1882.]

No. 8374.

BECKMAN, APPELLANT, VS. SKAGGS ET AL., RESPONDENT.

INTEREST—COUNSEL FEE—MORTGAGE—APPEAL—MODIFICATION OF JUDGMENT—DECREE. Plaintiff, in a mortgage foreclosure suit, is entitled to interest, according to the terms of the mortgage, down to the time of entry of a second decree, in pursuance of the direction of the appellate Court ordering a modification of the former decree, at the appeal of plaintiff, because rendered for too small an amount.

ID. Further held: Plaintiff was entitled to a reasonable counsel fee for prosecuting such former appeal.

Appeal from Superior Court, Sacramento County,

A. L. Hart, for appellant.

Dunlap & Van Fleet and *Curtis & Clunie*, for respondents.

By the COURT:

Plaintiff commenced this suit to foreclose a mortgage on a lot in the city of Sacramento. Judgment of foreclosure was entered in the case, but for a smaller amount than was claimed to be due. Plaintiff thereupon appealed to the Supreme Court and the judgment of the Court below was reversed, the appellate Court holding that the judgment was for a less amount than plaintiff was entitled to. The remittitur sent the case back with instructions "to modify the decree in accordance with the views therein expressed."

The first judgment was entered on the 17th day of March, 1881, and the judgment was entered upon the remittitur on the 16th day of January, 1882. When the remittitur was filed, and before the judgment was entered up thereon, the plaintiff demanded interest on the mortgage according to its terms, down to the time of the entry of the decree of January, 16, 1882; and this we think he was entitled to.

Plaintiff also claimed a counsel fee for prosecuting the appeal to the Supreme Court and proved that two hundred

and fifty dollars was a reasonable fee for such services. This amount should have been allowed.

The judgment is reversed, and cause remanded with instructions to allow the interest and counsel fee claimed.

DEPARTMENT No. 1.

[Filed August 24, 1882.]

No. 8058.

GRAY, PETITIONER,

VS.

SUPERIOR COURT OF AMADOR COUNTY,
RESPONDENT.

UNDEXTAKING—APPEAL—COSTS—JUSTICE'S COURT—SUPERIOR COURT. On appeal from a Justice's Court, the Superior Court may allow appellant to file a new undertaking for costs on appeal, in place of one insufficient in form, filed in the Justice's Court.

JUSTIFICATION OF SURETIES. The action of the Superior Court with reference to the justification of sureties was within its jurisdiction.

Prohibition.

Gray and Hall, for petitioner.

Armstrong, for respondent.

By the COURT:

An instrument purporting to be an undertaking in the sum of more than one hundred dollars, was filed in the Justice's Court with the notice of appeal for the payment of costs on appeal. In *McConkey vs. The Superior Court*, no undertaking for costs on appeal had been filed, either in the Justice's or Superior Court; nevertheless, the latter Court was proceeding to hear the appeal. Prohibition issued, this Court saying "Whether a proper undertaking for the payment of costs on appeal may be substituted in the Superior Court for one sufficient in form filed with the Justice, is not a question which the exigencies of this case demand of us to decide." (56 Cal. 84.) In the case now before us the Superior Court permitted the appellant to file an undertaking in lieu of the undertaking insufficient in form. It was held by the Supreme Court of this State, prior to the passage of the Act in terms authorizing the substitution (Stats. 1861, p. 589), that an appellant might file a new undertaking in place of one held insufficient in the appellate Court. (*Stark vs.*

Barrett, 15 Cal. 360.) And this under a statute like Section 978 of the Code of Civil Procedure. (Practice Act of 1851, Sec. 348.)

With respect to a question of practice, like that here presented, we do not feel authorized, at this late day, to disturb a ruling intended to assist parties to a hearing in the appellate Court.

The action of the Superior Court with reference to the *justification of sureties* was clearly within its jurisdiction.

Demurrer sustained and proceeding dismissed.

IN BANK.

[Filed August 30, 1882.]

No. 8094.

EDE ET AL., APPELLANTS, VS. HAZEN ET AL., RESPONDENTS.

EQUITY—DEFAULT—MOTION—JUDGMENT—EXCUSABLE NEGLECT—MORTGAGE—FORECLOSURE—INJUNCTION. Plaintiffs, against whom, as subsequent mortgagees, a default judgment had been entered in an action for the foreclosure of a prior mortgage, filed their bill in equity to set aside the decree of foreclosure and order of sale and for an injunction, on the ground that the prior mortgage had been before the entry of default, by agreement of the parties thereto, released. The fact of such release was known to plaintiffs herein within forty days after the entry of the judgment, and this bill was filed within less than five months after their defaults had been entered in the action in which the judgment was entered against them, which they now seek to have set aside. *Held*, the remedy of plaintiffs was by motion in the original action to set aside the default on the ground of excusable neglect; not by a proceeding in equity.

ID.—ID. The assistance of equity cannot be invoked so long as the remedy by motion exists.

Appeal from Superior Court, Plumas County.

Variel and *Barstow* for appellants.

Jenks and *Goodwin* for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

If the plaintiffs are entitled to any relief, they might have obtained it by making a timely application to the Court, in which the judgment, they seek to have set aside, was rendered. That judgment was entered on the 10th day of December, 1880, and on the 18th day of January, 1881, the plaintiffs were informed that the mortgage foreclosed had

been fully satisfied prior to the entry of the judgment of foreclosure. If they might have successfully pleaded that satisfaction, as a defense to the action, and were prevented from doing so, by reason of the concealment of the fact from them, until after the entry of the judgment, it would constitute a case of *excusable neglect*, for which the Court might have relieved them from the judgment within six months after its entry. (C. C. P., Sec 473.)

"Equity will not maintain jurisdiction of a suit of this nature, merely on the ground that the demand may be unconscientious, and that injustice may have been done, provided it was competent for the party to have placed the matter before the Court in the original action, either upon issues joined or upon motion to set aside the verdict or judgment." (*Borland vs. Thornton*, 12 Cal. 440.)

"The assistance of equity cannot be invoked so long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity." (*Bibend vs. Kreutz*, 20 Cal. 109.)

As appears upon the face of their complaint, the plaintiffs discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside; and if it be conceded that upon those facts they are entitled to the relief they now claim, it is clear that they had "a speedy, complete, adequate, summary remedy in the same proceeding, and that the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action." (*Ketchum vs. Crippen*, 37 Cal. 223.)

It further appears by the record that this action was commenced within less than five months after the defaults of the plaintiffs had been entered in the action in which the judgment was rendered against them which they now seek in this action to have set aside.

It is unnecessary to express any opinion upon any other question in the case.

The demurrer was properly sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Judgment affirmed.

We concur: Morrison, C. J., Ross, J., Myrick, J., McKinstry, J., Thornton, J., McKee, J.

In the Circuit Court of the United States

DISTRICT OF CALIFORNIA.

JOHN CRELLIN ET AL.

VS.

WILLIAM C. ELY AND WASHINGTON G. ELLIOTT.

1. Where an action for the possession of real property is brought in the Circuit Court of the United States by plaintiffs who are non-residents of the State and absent from it, and the defense to the action arises from matters purely of equitable cognizance, and a suit in equity for relief against the action is brought, the Court will enjoin proceedings in the action at law until the suit in equity can be heard and determined, and direct service of the subpoena in the equity suit to be made on the attorneys of the plaintiffs in the action at law.
2. The retainer of attorneys at law by non-residents to bring an action to recover possession of land in this State, authorizes them to appear for their clients in a suit in equity, instituted by the defendants in that action, to establish their defense; and service of the subpoena in such suit on the attorneys may be allowed by the Court and held to be good service.

STATEMENT.

This is a suit in equity for relief against an action at law commenced by the defendants against the complainants for the possession of certain lands in the city of Oakland, in this State. Upon an affidavit of one of the complainants, that their defense to the action at law arises out of matters which are purely of equitable cognizance; that the plaintiffs therein are non-residents of the State and absent from it, and that a subpoena issued in this suit could not be served upon them by reason of such absence, an order was issued and served upon the attorneys in the action at law to show cause why the subpoena should not be served upon them in place of the plaintiffs. Upon its return, the attorneys reply in substance, that they have only been retained to prosecute the action at law for the recovery of the lands, and do not consider themselves authorized to appear for their clients in any other proceedings.

The complaint in the action at law is in the usual form in such cases, alleging seisin of the premises and right of possession by the plaintiffs on a day designated, and the wrongful entry of the defendants thereon and their withholding of the same. It places the damages for such withholding at one hundred thousand dollars. It also asks judgment for the rents and profits of the land during the occupation of the defendants, alleging them to amount to four hundred thousand dollars. One of the plaintiffs is a citizen of New York, the other is a citizen of Michigan; both of them, as stated above, are non-residents of this State and absent from it. The defendants are either citizens of California or corporations created under its laws. They have

appeared to the action and answered the complaint, denying the allegations of seisin and right of possession by the plaintiffs, and pleading in bar of the action the statute of limitations, and also title and seisin in themselves. But they assert that they cannot make their defense as to the seisin of the premises in themselves available, unless they obtain the relief prayed in their suit in equity; and that the statute of limitations will not bar a recovery as the plaintiffs claim under a patent issued within five years upon a confirmation of a Mexican grant, which patent is deemed to create a new title as against parties not claiming under the same grant.

The complaint in this suit alleges in substance that in 1856 the premises for which the action at law is brought, with several other tracts of land, were owned by three parties, Edward Jones, John C. Hays and John Caperton, being held by them as tenants in common; that during that year Jones contracted to sell his undivided interest for a valuable consideration to one Henry A. Cobb; that in pursuance of such contract of sale a conveyance, supposed at the time to embrace the premises in controversy, which constitute a block of land in the city of Oakland, was made to him, but by a mistake in the drafting of the deed the block, which in the contract of sale was designated by number 159, was omitted; that under the deed executed in the belief that it conformed to the contract and embraced the block, the purchaser, Henry A. Cobb, went into possession, and continued in possession with his co-tenants, Hays and Caperton, until some time in 1857, when he sold and conveyed his interest to one John Francis Cobb; that the latter went into possession under the conveyance, and afterwards made partition with his co-tenants, and in such partition the premises in controversy were allotted to him, and that he, or parties claiming through him, have been in the possession thereof ever since and have made lasting and valuable improvements thereon, claiming all the time to own the premises; that in the year 1859 the said Jones executed in the State of New York a conveyance, in general terms, of all his property to the plaintiffs, and they claim the premises in controversy, or some part of them, under this deed. The complainants pray that an injunction may be issued to restrain the prosecution of the action at law, and for general relief.

Cope & Boyd and W. W. Crane, for complainants.

Flournoy & Mhoon, for defendants.

FIELD, J.:

The case presented by the bill in equity is sufficient to justify the Court in directing a stay of proceedings in the action at law until the plaintiffs therein appear to the suit and until it is heard

and determined. It is brought in aid of the defense to that action, and if the complainants are entitled to a correction of the deed executed to their grantor in 1856, or to a conveyance from the defendants, as purchasers with notice of their equity, it would be inequitable to preclude them from showing the fact and obtaining the relief prayed. In the State Courts the complainants here could, as defendants in the action at law, set up in their answer their equitable defense and obtain a decree upon it before the trial of the issue at law. (*Arguello vs. Edinger*, 10 Cal. 159; *Weber vs. Marshall*, 19 Cal. 447.) The plaintiffs in that action are allowed by reason of their citizenship in another State to institute their action in the Circuit Court of the United States, but they ought not to be permitted for that reason to deprive the defendants therein, the complainants here, of any just defense to which they are entitled under the laws of the State, although by reason of the separate systems of law and equity in the Federal Courts, they are obliged to seek their relief through the more cumbersome and laborious proceeding of an independent suit.

The complainants will be allowed to serve a subpoena upon the attorneys of the plaintiffs in the action at law, and an order will be entered granting an injunction staying proceedings in that action until the hearing and determination of this suit or the further order of the Court, upon the complainants filing a bond in the usual form in such cases for damages if it should be ultimately determined that they are not entitled to the relief prayed, or the suit should be dismissed—the bond to be approved in form and amount by the Circuit Judge.

Although the attorneys of the plaintiffs in the action at law are not specially authorized, as stated by them, to appear for the plaintiffs in any other case, their original authority is deemed to extend to such proceedings as immediately affect the right to recover the property in controversy. The power of a Court of equity to authorize substituted service in suits instituted in aid of the defense to an action at law, where the plaintiffs in such action are non-residents and absent from the State, is well established. Says Daniel, in his *Treatise on Chancery Pleadings and Practice*, which is a work of approved merit: "The jurisdiction is most frequently exerted where actions at law are brought by persons resident abroad to enforce demands, which, although they have, strictly speaking, a legal right to make, it is against the principles of equity to permit. In such cases, the Court will interfere by injunction served upon the attorney employed in this country to conduct the proceedings at law, to restrain the further prosecuting of such proceedings until his employer has submitted himself to the jurisdiction.

"In order to accomplish this purpose, it is permitted to the plaintiff in equity, in the first instance, to obtain an order, directing that service of the subpoena upon the attorney employed

in the cause at law shall be deemed good service." (Second American Edition, 518. See also *Burke vs. Vickers*, 3d B. C. C. 23; *Stephen vs. Cini*, 4 Vesey, Jr., 359; and *Kenworthy vs. Accunor*, 3 Madd. 550. The same doctrine is recognized in the Courts of the United States. *Hilner vs. Suckley*, 2d Wash. C. C. 465; *Read vs. Consequa*, 4 Ibid; 174.)

Order for an injunction on the bill in equity, and for the service of a subpoena on the attorneys in the action at law, granted.

Abstracts of Recent Decisions.

COMPROMISE BY ATTORNEY. Courts are inclined to favor a compromise fairly made by an attorney of a matter in litigation, and will uphold it if good reasons can be found for it.—*Whipple vs. Whitman*, Sup. Ct. R. I. 21 Am. Law Reg. 475.

LIBEL. In determining whether a publication is libelous, the words are to be taken in their usual, popular, and natural sense, as they would be received by the world. *Commonwealth vs. Chambers*, Phil. Qr. Sessions, 3 Crim. Law Mag. 542.

DYING DECLARATIONS. Dying declarations are admissible only in cases of homicide, and such declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.—*Montgomery vs. State*, Sup. Ct. Ind. 3 Crim. Law Mag. 523.

New Law Publications.

AMERICAN AND ENGLISH RAILROAD CASES. *Edward Thompson, Northport, New York, editor and publisher.*

This periodical is now in its sixth volume, and has more than fulfilled the promises made for it when its first volume was issued in January, 1881. It contains all the railroad decisions of this country and England, gives a full statement of each case and the briefs filed therein by the respective counsel, and supplements many of the decisions with exhaustive notes. We know of no State reports that are more satisfactory in their mode of reporting than are the volumes of this journal. To lawyers who have much litigation in this now clearly defined branch of the law, it is an invaluable assistant. The large number of authorities cited in the notes and briefs of counsel make a very important addition to the decisions reported, and make a reference to text books superfluous. We wish success to this journal.

Pacific Coast Law Journal.

VOL. X.

SEPTEMBER 23, 1882.

No. 5.

Current Topics.

HONEST JOURNALISM.

The custom of "exchanging" that has so long prevailed among journals of all kinds, though born of courtesy, has now become a necessity. The benefits are as mutual as the courtesy.

The object of every editor is to furnish to his subscribers an interesting and instructive publication. All of his matter need not be original. His readers are satisfied if it be readable. They are not pleased, however, if they discover that an editor is furnishing them with matter as his own, which is not his own, but comes from another editor's brains.

This species of imposition is practiced so much that we are compelled to notice it. In a certain Journal for September 15, 1882, there is an article entitled "Love and Law," taken from the Pacific Coast Law Journal, but no credit is given to the latter journal.

In this same journal for September 7, 1882, there is an abstract of the case of "*People vs. Clarence Gray*," and in the previous number there are abstracts of three cases, "*Mesmer vs. Jenkins*," "*Cal. S. R. R. vs. Kimball*," and "*Los Angeles Bank vs. Raynor*," all of which were first published, in full, in the Pacific Coast Law Journal. No credit, however, is given to this journal.

This is not correct journalism. The object of publishing abstracts of decisions is to furnish subscribers with references to important decisions when there is not space to publish the same in full. Fairness to the journal that does report them in full demands that credit be given, and fairness to subscribers demands that a reference be given whereby they may be able to find the full report.

We are forced to say this because we so seldom see a reference to this journal in other journals that republish our pages. In volume 8 of the Pacific Coast Law Journal we published upwards of four hundred abstracts of decisions, and in every case we referred by volume and page to the journal containing the decision in full.

ERRATA.—In the current topic on "Bill of Exceptions," in the last number, the word "not" was omitted before the words "too late" in the second line of the fourth paragraph. In the second line of the fifth paragraph the word "amendatory" should have been "mandatory."

Supreme Court of California.

IN BANK.

[Filed September 15, 1882.]

No. 8559.

IN THE MATTER OF THE APPLICATION THAT HYMES H.
LOWENTHAL BE DISCHARGED, ETC.

REMOVAL OF ATTORNEY—LICENSE—FRAUD. With the exception of the alleged fraud of defendant by which he obtained a license from this Court, the charges against the defendant are based upon transactions occurring while he was a member of the bar of New York. *Held:* The order of this Court admitting the defendant to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered. It follows that the judgment, while it continues in force, is an adjudication determinative of the fact that defendant was of "good moral character" when he was admitted by this Court, and an attack upon his previous character cannot be made the basis of an order for his "removal."

Nevertheless this Court will be justified, of its own motion, in setting aside the order admitting the defendant to practice, should it appear that the order was obtained by means of fraudulent artifices of concealment.

Id.—Id. Section 279 of the Code of Civil Procedure provides that any person "who has been admitted to practice law in the highest Court of a sister State" may be admitted to practice here "upon production of his license," etc. If upon the production of such license, it should be made to appear that the license had been revoked and the applicant disbarred, the fact would be evidence, not only that the applicant was not of good moral character, but also evidence that the *judgment* admitting him had been reversed and annulled. The section of the Code means, not only that the applicant shall present a "license" showing that he had at a certain time been admitted in another State, but requires that this Court shall be satisfied that he has continued to be a member of the bar of such State, in good standing up to the time of his application.

Id.—Id.—MARINE COURT OF NEW YORK. Defendant held a license issued by the Supreme Court of New York. The accusation claimed that prior to his presentation of such license to this Court his right to practice in the Courts of New York had been taken away by an order of the Marine Court of the city of New York, based upon charges of misconduct in office. *Held,* as the case is presented, the power of the Marine Court is to be determined by the law of New York. But the law of New York is a *fact* which can only be ascertained when issues of fact are joined. No strict analogy can be drawn between the law of California and the law of New York, where it would seem the system and organization of Courts are different. But by our own Code Courts may "suspend" which have no power to admit.

Id.—Id. The defendant may by answer deny the power of the Marine Court to suspend, or he may allege that the suspension is no longer in force; but as the accusation stands, it alleges facts, which, if not denied, or if proved, will justify the Court in setting aside the order by which defendant was admitted.

James E. Crittenden, for the order.

Delos Lake, for defendant.

MCKINSTRY, J., delivered the opinion of the Court:

The defendant objects to the written "application" that it does not state facts sufficient to constitute a cause for his removal or suspension.

Section 287 of the Code of Civil Procedure provides that an attorney and counselor may be removed for certain causes "arising after his admission to practice."

With the exception of the alleged fraud of defendant by which he obtained a license from this Court, the charges against defendant are based upon transactions occurring while he was a member of the bar of New York.

We do not deem it necessary to inquire whether under our Constitution the Legislature can limit the power of the Court, with respect to the admission, removal, or suspension of attorneys. Assuming, for the present, that the authority to admit to the practice of the law has been conferred on this Court by the Legislature, Section 279 of the Code of Civil Procedure authorizes the Court to admit to practice one who has been admitted in the highest Court of another State, upon production of his license "and satisfactory evidence of good moral character."

The order of this Court admitting the defendant to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered. (*Ex parte Garland*, 4 Wallace, 378.) It follows that the judgment, while it continues in force, is an adjudication determinative of the fact that defendant was of "good moral character" when he was admitted by this Court, and an attack upon his previous character cannot be made the basis of an order for his "removal."

Nevertheless this Court will be justified, of its own motion, in setting aside the order admitting the defendant to practice, should it appear that the order was obtained by means of fraudulent artifices or concealment.

It is not necessary to decide that this Court, in ascertaining whether fraud had been practiced by an applicant for admission, would receive evidence derogatory from his general good character. It may be assumed that the order of admission would preclude such inquiry, even in a proceeding to annul the order. Inasmuch, however, as applications for admission are made *ex parte*, we do not wish to be understood as announcing that we would not entertain an

application to set aside an order of admission based upon a charge that the applicant had fraudulently concealed from us his conviction of gross misconduct by a Court of another State, even although such conviction had not been followed by his removal or suspension, but had been simply punished by fine or imprisonment, as a contempt. In such case the applicant would have obtained his admission by means of fraudulent concealment. The fraud and admission would, in effect, have been contemporaneous, and it would be extremely technical, to say the least, to hold that he was not subject to discipline until the order admitting him had been formerly entered and he had taken the oath of office. And as the fact concealed, if any, would be a matter of record, which could be met only by other record evidence, no danger would be incurred by this Court being called on to try a doubtful question of fact, arising out of a charge, the offspring, perhaps, of envy or malice.

But we do not find it necessary to base our conclusion upon the ground that we may set aside an order of admission secured by fraudulent concealment of facts affecting the moral character of the person admitted.

Section 279 of the Code of Civil Procedure provides that any person "who has been admitted to practice law in the highest Court of a sister State" may be admitted to practice here "upon production of his license," etc. If upon the production of such license, it should be made to appear that the license had been revoked and the applicant disbarred, the fact would be evidence, not only that the applicant was not of good moral character, but also evidence that the *judgment* admitting him had been reversed and annulled. The section of the Code means, not only that the applicant shall present a "license" showing that he had at a certain time been admitted in another State, but requires that this Court shall be satisfied that he has continued to be a member of the bar of such State, in good standing, up to the time of his application.

Such has been the construction given the section; and where an applicant concealed the fact that he had been disbarred in the State from whence he came, the order of this Court admitting him was set aside. (*In re Clarke*, No. 7316, March 22, 1881.) Unless, therefore, the order of admission by which defendant acquired the right to practice in New York was in full force and effect when he was admitted here, we will be justified by principle and precedent in setting aside the order of admission.

The license issued by the Supreme Court of New York,

and presented to us when Mr. Hymes H. Lowenthal applied for admission, authorized him to practice in all the Courts of record of that State.

There is attached to the complaint or petition before us an exhibit, in words and figures as follows:

“EXHIBIT A.”

“In the matter of Hymes H. Lowenthal, an attorney, etc.

Before Shea, C. J., Alker and Jochaminsen, J. J.:

“Hymes H. Lowenthal, an attorney and counselor of this Court, and of the Supreme Court of the State of New York, having answered, in open Court, to specified charges of misconduct in his office as such attorney and counselor against him, mentioned in the order to show cause, and the said Lowenthal having been heard in person and by counsel, and the Court having considered the matter, now decide as fact: That said Lowenthal did misbehave himself in the matter so stated in said order to show cause, by being the person who did simulate the said pretended erasure, or by being privy thereto, and by supporting the said falsification by untrue statements made by him under oath in a judicial proceeding in this Court. It is now hereby ordered and adjudged that the said Hymes H. Lowenthal be and he is hereby suspended from practice as an attorney and counselor in this Court, and every branch thereof, until the further order of this Court.

“At a general term held June 28, 1875.

(A copy.)

“John Savage, Clerk.”

[Seal of the Marine Court of the city of New York.]

It is true that his suspension “until further order” by the Marine Court did not operate his suspension from practice in the Court of appeals, nor would his suspension by any number of Courts in that State other than the Supreme Court. But it is equally true that his indefinite suspension by any Court of record suspended in part the force and effect of a license which authorized him to practice in all the Courts of record. By virtue of his admission by the Supreme Court, Mr. Lowenthal became an officer of the Marine Court, and while the order of the Marine Court remained he ceased to be such officer. It does not appear that he was disbarred or suspended by the Supreme Court of New York, but neither does it appear that the Supreme Court had occasion to observe his commendable or objectionable practices. If the order of the Marine Court was a

valid order, and operative when defendant made his application to be admitted here, and the order had been called to our attention, we would have said: "The application must be denied. The order of the Marine Court not only shows the applicant to be unworthy, but it also proves that the applicant is not in possession of all the rights and privileges which were accorded him by the order of the Supreme Court of New York. We construe our Code as not only requiring that he shall once have been admitted by the Supreme Court, but that he must now be entitled to ingress to all the Courts of record of that State."

It is said that inasmuch as Mr. Lowenthal was admitted by the Supreme Court of New York, he could be disbarred or suspended by that Court alone. This is but saying, in different terms, that the Marine Court had no jurisdiction to make the order. No statute of New York has been proved or called to our attention, nor has a judicial decision in that State been cited, which declares or holds that the Marine Court had no power, when the order was made, to suspend an attorney or prohibit his further practice in that Court. His admission by the Supreme Court is one thing; the indefinite suspension of his right to practice in the Marine Court is another.

If the judgment of the Marine Court was irregular or improper it would seem Mr. Lowenthal had his remedy—by *mandamus* (1 Cal. 190,) or by *certiorari* in the nature of a writ of error (64 N. C. 202, 11 Allen, 473), or by appeal—or by some other appropriate proceeding.

However this may be, we cannot say that the judgment of the Marine Court is *void*, or that its power was unjustly exercised. Nor can we say that the misconduct of the defendant might have been sufficiently punished as a *contempt*, by fine and imprisonment. If the power to suspend existed in the Marine Court, it was an independent power, to be employed in proper cases for its own protection; a power entirely distinct from, although of a like nature to, the power to punish for contempt.

That the right to admit to practice in all Courts of record does not *necessarily* preclude the right of suspension by any Court of record, is sufficiently apparent. By the 277th Section of our own Code of Civil Procedure, the power to admit to practice in all the Courts of this State is vested in the Supreme Court. Yet the power to "remove or suspend" is conferred upon the Superior Courts. (C. C. P. 287.)

The order of the Marine Court is before us, and, in the

absence of any proof of the law of New York, a strong presumption arises that the learned Judges of the Marine Court had jurisdiction to make the order which they in fact made. Besides, by alleging in their accusation, the *effect* of the order of suspension, the accusers here have sufficiently averred—as against a general demurrer or objection—that the Marine Court had power to make the order; an averment which must be taken as true in determining the validity of the objection to the accusation.

Again it would seem that by the statutes of New York the Marine Court had jurisdiction to suspend one practicing at its bar. (1 Rev. Stats. N. Y. 401, Sec. 25.)

Finally, as the case is presented, the power of the Marine Court is to be determined by the law of New York. But the law of New York is a *fact* which can only be ascertained when issues of fact are joined. No strict analogy can be drawn between the law of California and the law of New York, where it would seem the system and organization of Courts are different. But as we have seen, by our own Code, Courts may “suspend” which have no power to admit.

The defendant may, by answer, deny the power of the Marine Court to suspend, or he may allege that the suspension is no longer in force; but as the accusation stands, we hold that it alleges facts, which, if not denied, or if proved, will justify us in setting aside the order by which defendant was admitted.

Objections overruled and defendant given twenty days to answer the accusation.

We concur: Thornton, J., Myrick, J., Morrison, C. J., Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed August 25, 1882.]

No. 8145.

PERHAM, RESPONDENT, VS. KUPER, ET AL., APPELLANTS.

PRACTICE—APPEAL—SPECIFICATIONS—SHERIFF'S SALE—DECREE—EVIDENCE—BILL OF EXCEPTIONS—JUDGMENT ROLL. Action to quiet title. Defendants claimed, on appeal, that the sale under a decree through which plaintiff claimed, was void as against them, as attaching creditors. But *held*, when the judgment roll was offered in evidence, the relation of defendants to the property had not been made to appear, and there is, in the bill of exceptions, no specification of insufficiency of evidence pointing toward the invalidity asserted. *Further*, no objection was made to the judgment roll when it was

offered in evidence, and the bill of exceptions contains no specification of deficiency in the evidence to the effect that the judgment roll and deed did not show title in plaintiff; nor even a specification that the plaintiff's title was not made out by the evidence.

Id. — REDEMPTION — VOID SALE — SHERIFF'S DEED. Defendants claimed under a Sheriff's deed executed April 5, 1875; the execution took place October 5, 1874. *Held*, the judgment debtor had the whole of the fifth day of April, 1875, to redeem (Sections 12 and 702, C. C. P.); and as the Sheriff had power to execute the deed only after the period for redemption had passed, the deed executed before such period is void.

Id. — FINDING. It may be that the Court should have found that defendants had an estate, etc., by virtue of the judgment, sale, and certificate of sale; but there is in the bill of exceptions no specification of insufficiency of the evidence to justify any of the findings, nor any such specification, except as to the evidence on which the Court found that the *Sheriff's deed* was void.

Appeal from Superior Court, Trinity County.

Williams and Burch, for appellants.

F. P. Dann, for respondent.

By the COURT:

James Paterson owned a mine. Plaintiff claimed to have acquired the title to the mine through a sale under a decree purporting to foreclose a lien of a material-man; and introduced in evidence the judgment roll in an action, *H. M. Perham vs. James Patterson*, an order of sale, Sheriff's return thereon, and Sheriff's deed to plaintiff. Defendants, appellants, allege here that the sale under the decree was void as against defendants, who were attaching creditors.

When the judgment roll was offered, the relation of defendants to the property had not been made to appear, and there is, in the bill of exceptions, no specification of insufficiency of evidence pointing toward the invalidity now asserted.

It is also urged that the Court had no jurisdiction of the person or property of Patterson, because the judgment roll contains no proof of the publication of summons in the action *Perham vs. Patterson*. But no objection was made to the judgment roll when it was offered in evidence, and the bill of exceptions contains no specification of deficiency in the evidence to the effect that the judgment roll and deed did not show title in plaintiff; nor even a specification that the plaintiff's title was not made out by the evidence.

Defendants claimed under a Sheriff's deed which was executed on the fifth day of April, 1875, the execution sale having taken place October 5, 1874. The judgment debtor had the whole of the fifth day of April, 1875, to redeem.

(C. C. P., Secs. 12 and 702.) The act of redemption was to be done within six months after the sale. The Sheriff had power to execute the deed only after the period for redemption had passed. The deed is void. (*Gross vs. Fowler*, 21 Cal. 392; *Bernal vs. Gleim*, 33 Id. 668; *Moore vs. Martin*, 38 Id. 428; *Hall vs. Yoell*, 45 Id. 584.)

It may be that the Court below should have found that the defendants had an estate, right, title, or interest in, and were entitled to the possession of the land, by virtue of the judgment, sale, and certificate of sale. But there is in the bill of exceptions no specification of insufficiency of the evidence to justify any of the findings, nor any such specification, except as to the evidence on which the Court found that the *Sheriff's deed* was void.

Judgment and order affirmed.

DEPARTMENT NO. 2.

[Filed August 30, 1882.]

No. 7761.

MOUNT BLANC CONSOLIDATED GRAVEL MINING
COMPANY, PLAINTIFF AND RESPONDENT,

VS.

DE BOUR, DEFENDANT, EVANS ET AL., INTERVENORS AND
APPELLANTS.

INTERVENTION—MINERAL LAND—CONTEST—PARTIES—REVISED STATUTES OF THE UNITED STATES. Appeal from order denying an intervention. Plaintiff filed its adverse claim to the mineral land in controversy, and commenced this action to have the right of possession determined, as provided by Sections 2325 and 2326, Revised Statutes of the United States. *Held*, the action is one in which those only who had filed claims to the land in the United States Land Office could properly be made parties to the action, which was brought for the sole purpose of determining the rights of possession between such adverse claimants. The rights of none others were involved in the action. The only question involved was whether defendant was entitled to a patent.

Id.—*Id.* In order to entitle themselves to become parties to this action, it was necessary for the appellants (interveners) to apply to the United States Land Office for a patent, or to file an opposition to the application of some one else within the time prescribed by law for so doing. Neither of which did they do.

Appeal from Superior Court, Nevada County.

George S. Hupe, for appellants.

Dibble & Kitts and Johnson & Cross, for respondent.

Niles Searles, for defendant.

By the COURT:

This is an appeal from an order denying the appellants' motion to file a complaint in intervention in the above entitled action. The sole question in the case is whether said complaint in intervention states facts sufficient to entitle the parties, in whose behalf it was sought to file it, to intervene in the action.

The plaintiff in the action alleges, among other things, that he is the owner and in possession of the mineral land in controversy; that the defendant claims an estate or interest therein adverse to the plaintiff, and that said defendant had, before the commencement of this action, filed an application in the United States Land Office for a patent to said land from the Government. The appellants admit that the defendant filed an application, and that he did so with their knowledge and consent and in pursuance of an agreement between the appellants and the defendant, that when he should obtain the patent so applied for he would convey to them in fee the undivided one-half of two certain lots of said mineral land.

The plaintiff in this action filed its adverse claim to said land, and commenced this action to have the question of the right of possession determined by a Court of competent jurisdiction, as provided by Sections 2325 and 2326, U. S. Rev. Statutes. It is not claimed that the appellants filed an application for a patent or any opposition to the issuance of one to the defendant. We are of the opinion that the action is one in which those only who had filed claims to the land in the United States Land Office could properly be made parties to the action which was brought for the sole purpose of determining the rights of possession between such adverse claimants. The rights of none other were involved in the action. The only question involved was whether the defendant was entitled to a patent.

In order to entitle themselves to become parties to this action, it was necessary for the appellants to apply to the United States Land Office for a patent, or to file an opposition to the application of some one else within the time prescribed by law for so doing. Neither of which did they do.

Order and judgment appealed from affirmed.

DEPARTMENT No. 1.

[Filed September 20, 1882.]

No. 8375.

CROSS, ADMR., ETC., OF THE ESTATE OF SIGOURNEY,
RESPONDENT,

VS.

ZELLERBACH, APPELLANT.

MORTGAGE—PLEDGE—EQUITY—SUPPLEMENTAL COMPLAINT—PARTY—ESCROW.

The original complaint was for the foreclosure of a mortgage made by the Eureka Lake Company to Sigourney. Pending the suit Zellerbach purchased from Sigourney the note and mortgage, and also a note and mortgage of the E. L. W. Co., in consideration of which he executed two notes to Sigourney, to secure the payment of which he was to deposit with one Parrott, in escrow, 5-64 parts of the capital stock of a corporation to be organized; the notes and mortgages were to remain in Parrott's hands as security for the payment of the Zellerbach notes until the deposit of the stock. Zellerbach did not deposit the full amount of the stock. Upon a former appeal (55 Cal. 431) it was held that plaintiff in the action to foreclose the Eureka Lake note and mortgage was not entitled to a lien on the stock deposited by Zellerbach with Parrott, in escrow, as security for the purchase of the mortgage then sued on, because the stock had not been accepted by plaintiff as security, and because the conditions upon which it was to be delivered never happened. The delivery never became absolute, and the stock continued as unaffected by any lien as though it had remained in Zellerbach's pocket; and the cause was remanded for a new trial. Execution of the judgment in such action pending the appeal had not been stayed, the stock was sold under the decree of the Court below, and after reversal, a supplemental complaint was filed setting up the purchase of the mortgage originally sued on by defendant pending the action for its foreclosure, the execution of two notes therefor, the deposit of the stock as security, the sale of the stock under the judgment subsequently reversed, and praying that the moneys realized from such sale shall be deemed and stand as the substitute for the stock; that plaintiff be declared entitled to retain the same upon his acknowledgment of full satisfaction and payment as well of the note and mortgage described in the original complaint, as also of the two notes executed by Zellerbach; which prayer was granted by the Court below. *Held*, on this appeal, that plaintiff retained the right to foreclose the mortgages which his agent, Parrott, held in pledge, if the Zellerbach notes were not paid at maturity, unless he lost the right by lapse of time; that it was the intent of the parties to the agreement (Zellerbach and Sigourney) that the suit for the foreclosure of the mortgage set forth in the original complaint, already begun, should be prosecuted by plaintiff; for the benefit, however, of Zellerbach, should he pay his notes before its termination, or substitute the other securities named in the agreement. It was an agreement relating to the conduct of the action, since, while it placed the legal title to the Eureka Lake note and mortgage in Zellerbach, it left the control of the suit—subject to contingencies—in Sigourney; a control necessary for the protection of his interests as pledgee.

- Id.—Id. The subsequent changes in the pleadings and findings have not entitled plaintiff to the lien on the stock and decree for the sale thereof denied him on the former appeal. The case stood at the second trial as if the shares of stock had never been deposited; never been levied on or sold.
- Id.—Id.—REVERSAL OF JUDGMENT—EXECUTION SALE. In the absence of an undertaking the purchaser of the stock (if a third party) acquired a good title to it. Whether defendant has or has not his action at law either for the value of the shares or the price at which they were sold is not a question to be determined here.
- Id.—Id. The shares of stock were the property of Zellerbach. If the original or present plaintiff (administrator) chose to levy upon and sell them under an execution issued upon the judgment subsequently reversed, he did so at his own risk. A Court of equity will not ratify a trespass or conversion.
- Id.—Id. The shares never constituted a portion of plaintiff's security, and the shares, or the disposition of them, have no connection with the facts upon which this case must be determined.
- Id.—Id. It follows: 1. Sigourney or his representative was justified in prosecuting his action for the foreclosure of the mortgage, and sale of the mortgaged premises. 2. Inasmuch as defendant, Zellerbach, by reason of his agreement with Sigourney, had become legal owner of the note secured by the mortgage, and interested in any excess of proceeds arising from the sale of the mortgaged premises, beyond the amount of his notes, or in having the sum of the proceeds endorsed or credited on his notes in case of a sale for less than their amount, the plaintiff was authorized, by supplemental complaint, to treat him as a proper, if not necessary party. 3. Having taken jurisdiction for the purposes aforesaid, the Court was authorized, upon well established principles of equity jurisprudence, to dispose of the rights of plaintiff and defendant Zellerbach, with reference to the pledge, by ordering judgment against said defendant for any balance of his note unsatisfied by the decretal note to be made.

Appeal from Superior Court, Nevada County.

Cross and Irvine, for appellant.

Reardan & Reardan, Hupp, Searles, Niles & Searles, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The Court below found that, after the commencement of this action, which was to foreclose a mortgage executed by the Eureka Lake Company, the note and mortgage described in the complaint, together with another note and mortgage made by the Eureka Lake Water Company, were sold by plaintiff to defendant Zellerbach, for and in consideration of promissory notes of said defendant; that the notes and mortgages so sold were placed in the hands of John Parrott, agent of plaintiff, as security for the payment of Zellerbach's notes.

Sigourney certainly retained the right to foreclose the mortgages which his agent held in pledge if the Zellerbach notes were not paid at maturity, unless he should lose the

right by lapse of time. (Tyler on Usury, Pawns, and Loans, 576, and cases there cited.) Was it his duty, under his agreement with Zellerbach, to dismiss the suit already pending?

The notes secured by the mortgages of the Eureka Lake Company and the Eureka Lake Water Company were dated respectively July 2, 1859, and November 9, 1861. The original complaint herein was filed July 1, 1864, one day before the statute period of limitations would have run as against the note sued on. The agreement between Sigourney and Zellerbach was made on the 23d day of August, 1865, when the statute limitation would already have run against the note of the Eureka Lake Company had not suit been brought upon it previously, and when but little more than two months remained of the period, at the expiration of which the limitation would have run against the note of the Eureka Lake Water Company. The notes of Zellerbach, to secure which the notes and mortgages of the companies were pledged, were made payable nine months after the date of the agreement. Under the circumstances we are authorized to say that it was within the contemplation of the parties and within the intent of the agreement that this suit for the foreclosure of the mortgage set forth in the complaint, already begun, should be prosecuted by plaintiff; for the benefit, however, of Zellerbach, should he pay his notes before its termination, or substitute the other securities named in the agreement. It was, indeed, an agreement relating to the conduct of the action, since, while it placed the legal title to the Eureka Lake note and mortgage in Zellerbach, it left the control of the suit—subject to certain contingencies—in Sigourney; a control necessary for the protection of his interests as pledgee.

When the case was here before (55 Cal. 431) it was held, upon the then pleadings and findings, that plaintiff had no lien upon and was not entitled to a decree for the sale of the 1250 shares of stock deposited by defendant Zellerbach with Mr. John Parrott. We cannot see that the subsequent changes in the pleadings and findings have entitled him to such decree.

The original answer and cross-complaint of defendant, Zellerbach, were withdrawn after the case was returned to the Superior Court. In his answer to the supplemental complaint he does not allege that he substituted the 1250 shares of stock for the notes and mortgages, or either of them, deposited with Parrott. The Court below did not find that such shares were accepted as a substituted security by

plaintiff or his agent, Parrott. Nor did the Court find that Mr. Parrott ever satisfied himself (as provided in the agreement) that the titles to all the property formerly belonging to the Middle Yuba Canal and Water Company and Eureka Lake Water Company had been conveyed to a new corporation five sixty-fourths part of the shares of the stock of which might be substituted as the security for the payment of the Zellerbach notes, or even that the titles to such property were ever in fact conveyed to a new company.

There is no allegation in the supplemental complaint that the original agreement between Sigourney and Zellerbach had been changed or modified so as that the 1250 shares (admittedly much less than five sixty-fourths) were to be treated as *additional* security, or were to be considered as having been substituted for a portion of the securities pledged to secure the payment of the notes of defendant Zellerbach.

Zellerbach never performed the conditions on his part to be performed by his agreement with Sigourney. The case stood at the second trial, therefore, as if the 1250 shares of stock had never been deposited—never been levied on or sold.

The 1250 shares were the property of Zellerbach. If the original or present plaintiff chose to levy upon and sell them under an order of sale issued upon the decree subsequently reversed, he did so at his own risk. A Court of equity will not ratify a trespass or conversion. In the absence of an undertaking, the purchaser of the stock (if a third party) acquired a good title to it. If, as alleged, the stock sold for \$25,000 more than it was then worth, so much the worse for the purchaser, if it has not risen in value since. But whether defendant has or has not his action at law, either for the value of the shares or the price at which they were sold, is not a question to be determined here. It is enough to say that the shares never constituted a portion of plaintiff's security, and the shares, or the disposition of them, have no connection with the facts upon which this case must be determined.

What follows? 1. Sigourney or his representative was justified in prosecuting his action for the foreclosure of the mortgage and sale of the mortgaged premises. 2. Inasmuch as the defendant Zellerbach, by reason of his agreement with Sigourney, had become legal owner of the note secured by the mortgage, and interested in any excess of proceeds arising from the sale of the mortgaged premises, beyond the amount of his notes, or in having the sum of the proceeds

endorsed or credited on his notes in case of a sale for less than their amount, the plaintiff was authorized by supplemental complaint to treat him as a proper, if not necessary, party. 3. Having taken jurisdiction, for the purposes aforesaid, the Court was authorized (upon well established principles of equity jurisprudence) to dispose of the rights of the plaintiff and defendant Zellerbach with reference to the pledge, by ordering judgment against said defendant for any balance of his notes unsatisfied by the decretal sale to be made.

We cannot say the findings of the Court below are not sustained by the evidence.

Judgment reversed and cause remanded, with direction to the Court below to enter a decree in accordance with the views hereinbefore expressed.

We concur: McKee, J., Myrick, J.

IN BANK.

[Filed September 21, 1882.]

No. 7956.

PEOPLE, ETC., PETITIONER,

VS.

E. V. SPENCER, RESPONDENT.

SUSPENSION OF ATTORNEY—DISTRICT ATTORNEY. In the year 1874, respondent, as District Attorney of Lassen County, drew up an indictment against one Harris, which was returned to the County Court by the Grand Jury, endorsed "a true bill." In 1881, Harris appeared in the Superior Court, and respondent, as his counsel, moved to set aside the indictment. The motion was granted. In preparing for and making the motion—which was based upon the omission of certain forms—respondent was not assisted by information received by him in his capacity of District Attorney; and when the motion was made, he had no usual knowledge of the statutory provision which made his act a misdemeanor. (Penal Code, Sec. 162.) *Held*, independent of the statute, there can be no doubt that the conduct of respondent was reprehensible. By appearing both for plaintiff and defendant in the same action, he was guilty of "a violation of his duty as an attorney," for which it is the duty of this Court to remove or suspend him. (C. O. P. 287.) Neither his ignorance of the laws, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety—no seriously evil consequences having resulted—should be less severe than where the offense is a deliberate or corrupt violation of official oath.

W. B. Haskell, for petitioner.

E. V. Spencer, for respondent.

By the COURT:

In the year 1874, respondent, as District Attorney of Lassen County, drew up an indictment against one Harris, which was returned to the County Court by the Grand Jury, endorsed "a true bill."

In 1881, Harris appeared in the Superior Court, and respondent, as his counsel, moved to set aside the indictment. The motion was granted.

In preparing for and making the motion—which was based upon the omission of certain forms—respondent was not assisted by information received by him in his capacity of District Attorney; and we are convinced that when the motion was made, he had no actual knowledge of the statutory provision which made his act a misdemeanor.

But, independent of the statute, there can be no doubt that his conduct was reprehensible. By appearing both for plaintiff and defendant in the same action, he was guilty of "a violation of his duty as an attorney," for which it is our duty to remove or suspend him. (C. C. P. 287.) Neither his ignorance of the laws, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety—no seriously evil consequences having resulted—should be less severe than where the offense is a deliberate or corrupt violation of official oath.

The circumstances presented by the record, while they go towards showing an absence of intentional wrong, do not justify respondent. However innocent his motives, his conduct must be condemned. Yet, in consideration of the facts, we are disposed to inflict a penalty which, while it shall satisfy the provisions of the Code, and mark our disapprobation of his act, shall not forever debar the respondent from the further practice of his profession.

Counsel for the people does not insist that the other charges are sustained by the evidence.

Ordered, that respondent be suspended from practice as attorney or counselor in all the Courts of this State, for a period of three months from the date of the filing of this order.

IN BANK.

[Filed September 15, 1882.]

No. 10,782.

EX PARTE WILL ON HABEAS CORPUS.

MILITIA—JURY DUTY. A party who has faithfully served in the organized militia of the State for the space of seven consecutive years, and has received from the Adjutant-General a certificate to that effect, is exempt from jury duty. (Pol. Code, 1936.)

Jno. H. Dickinson, for petitioner.

L. Pratt, for respondent.

By the COURT:

The question in this case is simply whether a party who has faithfully served in the organized militia of the State for the space of seven consecutive years, and who has received from the Adjutant-General a certificate to that effect, is exempt from jury duty?

Section 1936 of the Political Code expressly provides for such exemption, and the petitioner was not liable to jury duty. Let him be discharged.

In the Circuit Court of the United States.

DISTRICT OF CALIFORNIA.

Before Field, Circuit Justice, and Hoffman, District Judge.

THE CASE

OF

THE CHINESE MERCHANT.

IN THE MATTER OF LOW YAM CHOW ON HABEAS CORPUS.

1. The first article of the treaty with China of November 17th, 1880, provides that, "Whenever, in the opinion of the Government of the United States, the coming of *Chinese laborers* to the United States, or their residence therein affects or threatens to affect the interests of that country or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it," declaring at the same time that "the limitation or suspension shall be reasonable, and shall apply only to *Chinese who may go to the United States as laborers, other classes not being included in the limitations.*" The second article further declares that "Chinese sub-

jects, whether proceeding to the United States as travelers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States shall be allowed to come and go of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." The Act of Congress of May 6th, 1882, passed pursuant to the authority of this treaty, suspends the coming of *Chinese laborers* to the United States for ten years, and prohibits the master of vessels from bringing them from any foreign port, but excepts those who were here previously to November 17, 1880, or who may come before the expiration of ninety days from the passage of the Act, and who shall produce certain prescribed certificates of identification. The sixth section of the Act provides that, in order to the faithful execution of the provisions forbidding the coming of Chinese laborers, any other Chinese person entitled to come to the United States shall be identified by a certificate of the Chinese Government, stating among other things his former and present occupation, and *place of residence in China*: *Held*, 1, that the certificate of the Government required for others than laborers coming to the United States from China was intended to facilitate proof of their not being within the prohibited class, and not as a means of restricting their coming; 2, that the certificate is not required from merchants and others not laborers domiciled out of China when the Act of Congress was passed, and coming from the foreign jurisdiction; and 3d, proof of the occupation of such persons may be made by parol.

2. The language of the Act of Congress should be construed, if possible, in harmony with the objects of the treaty. It will not be inferred that Congress intended to disregard its stipulations.

HABEAS CORPUS. The facts sufficiently appear in the opinion of the Court.

McAllister & Bergin, for petitioner.

Milton Andros, for respondent.

Philip Teare, District Attorney, for Collector of Port.

FIELD, Circuit Justice: The petitioner is a subject of the Emperor of China, and alleges that he is restrained of his liberty on board of the American steamship *City of Rio de Janeiro*, in the port of San Francisco, by its captain, in contravention of the Constitution and the treaty between the United States and his country. He states in his petition in substance as follows: that he is a Chinese merchant by occupation, and not a Chinese laborer; that he was such merchant in Peru for about ten years; that upon the breaking out of the war between that country and Chile, he left Peru and established himself at Panama, in the Republic of New Granada; that for the last five years he has also been a member of the firm of Chow Kee & Co., merchants in San Francisco; that on the thirty-first day of July last he took passage at Panama on the steamship which arrived at the port of San Francisco on the seventeenth of August, and that its captain refuses to allow him to land, but detains him on board of the vessel under the claim that his landing in the United States is prohibited by the Act of Congress of May

6, 1882, "to execute certain treaty stipulations relating to Chinese;" that such claim is unfounded; that the petitioner has been a merchant by occupation for the last twelve years, and has never been a laborer within the meaning of the treaty. He therefore prays that a writ of habeas corpus be issued to the captain to produce him, and that he be discharged from his arrest. The writ being issued, the captain makes a return admitting the detention of the petitioner and justifying it under the Act of Congress.

On the hearing, proof was received against the objection of counsel, of the truth of the petitioner's averment, that he is a merchant by occupation, and has been such for years either in Peru or at Panama. No attempt to impeach this evidence was made.

Two questions are thus presented for determination: 1st. Whether Chinese merchants, who resided, on the passage of the Act of Congress, in other countries than China, on arriving on a vessel in a port of the United States, are required to produce certificates of the Chinese Government establishing their character as merchants, as a condition of their being allowed to land; 2d. Whether their character as such merchants can be established by parol proof. For a correct solution of these questions some reference must be had to the treaties between China and this country: In the fifth article of the one concluded in July, 1868, generally known as "the Burlingame treaty," the contracting parties declare that "they recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." In its sixth article they declare that "citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation, and reciprocally Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation."

Whilst these articles remained in full force no legislation by Congress looking to a suspension of, or restriction upon the immigration of Chinese, engaged in any lawful occupation, was possible without a breach of faith towards China. And yet it was discovered that the physical characteristics and habits of the Chinese prevented their assimilation with our people. Conflicts between them and our people, disturbing to the peace of the country, followed, as a matter of course, and were of frequent occurrence. Chinese laborers, including in that designation not merely those engaged in manual labor, but those

skilled in some art or trade, in a special manner interfered in many ways with the industries and business of this State. Their frugal habits, the absence of families, their ability to live in narrow quarters without apparent injury to health, their contentment with small gains and the simplest fare gave them great advantages in the struggle with our laborers and mechanics, who always and properly seek something more from their labors than sufficient for a bare livelihood, and must have and should have something for the comforts of a home and the education of their children. A restriction upon the immigration of such laborers was, therefore, felt throughout this State to be necessary, if we would prevent the degradation of labor and preserve the blessings of our civilization. Through the urgent and constantly repeated appeals from the Pacific coast, the Government of the United States was induced to make application to the Government of China for a modification of the treaty of 1868; and the supplementary treaty of November, 1880 was the result. The first article of this treaty provides, that "Whenever in the opinion of the Government of the United States the coming of *Chinese laborers* to the United States, or their residence therein affects or threatens to affect the interests of that country or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it," declaring at the same time that "the limitation or suspension shall be reasonable, and shall *apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.*" The second article further declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The Act of May 6th, 1882, was framed in supposed conformity with the provisions of this supplementary treaty. In the inhibitions which it imposes upon the immigration of Chinese, there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that Congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese laborers. It provides in express terms, as seen above, that the limitation or suspension shall apply only to them, "*other classes not being included in the limitations.*"

The Act of Congress declares in its first section that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of *Chinese laborers* to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come or having so come after the expiration of said ninety days to remain within the United States." And its second section makes it a misdemeanor, punishable by fine and imprisonment, for the master of any vessel to knowingly bring within the United States on such vessel and land or permit to be landed any *Chinese laborer* from any foreign port or place.

The third section excepts from these provisions Chinese laborers who were in the United States on the seventeenth of November, 1880, or who shall have come before the expiration of ninety days from the passage of the Act, and shall produce to the master of the vessel and the Collector of the Port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

The Act, conforming to the supplementary treaty, is aimed against the immigration of *Chinese laborers*—not others. The sixth section, which is supposed to cover the present case, was not intended to prohibit the coming to the United States of other classes of persons, but to prevent, by a prescribed mode of proof, the evasion of the prohibition against the coming of laborers. Its language is as follows: "That in order to the faithful execution of articles one and two of the treaty in this Act before mentioned, every Chinese person other than a laborer, who may be entitled by said treaty and this Act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in such case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and *place of residence in China* of the person to whom the certificate is issued, and that such person is entitled conformably to the treaty in this Act mentioned to come within the United States. Such certificate shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the Collector of Customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive."

The certificate mentioned in this section is evidently designed to facilitate proof by Chinese other than laborers coming from China and desiring to enter the United States, that they

are not within the prohibited class. It is not required as a means of restricting their coming. To hold that such was its object would be to impute to Congress a purpose to disregard the stipulation of the second article of the new treaty, that they should be "allowed to go and come of their own free will and accord." Nor is it required, as a means of proof of their character, from merchants and others not laborers domiciled out of China when the law was passed, and coming here from such foreign jurisdiction. The particulars, which the certificate must contain, show that it was to be given to those then residing there, for their *place of residence in China* is to be stated. Independently of this consideration, that government could not be expected to give, in its certificate, the particulars mentioned of persons resident—some perhaps for many years—out of its jurisdiction. Neither the letter nor the spirit of the Act calls for a construction imputing to Congress the exaction of a condition so unreasonable. The general language of the twelfth section, "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate required in the Act, of Chinese persons seeking to land from a vessel," is to be construed as applying to such persons as are by previous sections prohibited from coming, not as extending the prohibition.

We repeat what we said in the case of Ah Tie and other Chinese laborers: that all laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression or an absurd consequence. In addition to the illustrations of this rule there given, we may refer to two instances furnished by the decisions of the Supreme Court. A law of Congress declares that whoever wilfully obstructs or retards the carrier of the mails of the United States, shall be deemed guilty of a public offense and be punished by a fine. A mail carrier in Kentucky was arrested by the Sheriff upon the charge of murder, and for the arrest the Sheriff was indicted. The Supreme Court held that the general language of the Act of Congress was not to be construed to extend to the case—because it was not the intention of Congress to interfere with the enforcement of the criminal laws of the State, but only to prevent unnecessary obstruction in the carriage of the mails. It would have been absurd to hold that the Act exempted from arrest a mail carrier charged under a State law with the commission of a felony. (*U. S. vs. Kirby*, 7 Wall. 482.)

So the Act of Congress for the recovery of the proceeds of captured and abandoned property during the late war required the claimant in the Court of claims to prove that he had never given aid or comfort to the rebellion, yet the Supreme Court held that one who had been pardoned by the President was relieved from this requirement. The general language of the Act covered

his case, but as the pardon in legal effect blotted out the guilt of the offender, that is, closed the eyes of the Court so that it could not be considered as an element in the determination of his case, the pardon was deemed to take the place of the proof and relieved him from the necessity of establishing his loyalty. "It is not to be supposed" said the Supreme Court, "that Congress intended by the language of the Act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property by the pardon of the President were not in contemplation of Congress in passing the Act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature." (*Carlisle vs. United States*, 16 Wall. 153.)

These cases would be sufficient to justify us in giving a construction to the Act under consideration in harmony with the supplementary treaty, even were the general terms used susceptible of a larger meaning. Its purpose will be held to be, what the treaty authorized, to put a restriction upon the emigration of laborers, including those skilled in any trade or art, and not to interfere, by excluding Chinese merchants, or putting unnecessary and embarrassing restrictions upon their coming, with the commercial relations between China and this country. Commerce with China is of the greatest value, and is constantly increasing.* And it should require something stronger than vague inferences to justify a construction which would not be in harmony with that treaty, and which would tend to lessen that commerce. It would seem, however, from reports of the action of certain officers of the Government—possessed of more zeal than knowledge—that it is their purpose to bring this about, and thus make the act as odious as possible.

We are of opinion that the section requiring a certificate for Chinese merchants coming to the United States does not apply to those who resided out of China on the passage of the Act of Congress, and that proof of their occupation may be made by parol.

NOTE—According to the statement furnished by the Chinese Consul, the value of exports to China from the United States, and from China to the United States for the year in which the Burlingame treaty was concluded (1868) amounted to \$15,365,013, and for the fiscal year ending June 30, 1881, amounted to \$27,765,409, almost doubling our commerce in thirteen years; of this latter amount \$16,185,165 of the merchandise passed through the port of San Francisco; and 70 per cent. of it was shipped by Chinese merchants. When the Burlingame treaty was concluded, the export of flour from California at the port of San Francisco amounted to about 20,000 barrels a year. The export of this article has steadily increased since, until in the last year (1881) it amounted to 271,118 barrels, 90 per cent. of which was shipped by Chinese merchants.

It follows that the petitioner must be discharged, and it is so ordered.

HOFFMAN, J.:

The petitioner alleges that he is unlawfully restrained of his liberty in contravention of the Constitution of the United States, and of the treaty between the United States and the Empire of China, commonly known as the Burlingame treaty; that he is a Chinese merchant, and not a Chinese laborer; that he was a Chinese merchant at Peru for about ten years, and that thereafter, upon the outbreak of war between Chile and Peru, he left the latter country and established himself as a merchant at Panama, in the Republic of New Granada, where he still resides. That for the last five years he has been a member of the firm of Kwong Sing Lung, Chow Kee & Co., merchants, in this city.

That on the 31st day of July, 1882, he took passage at Panama on board the American steamship Rio de Janeiro and arrived at this port on the said steamship on the 17th day of August, 1882, but that he is unlawfully restrained of his liberty and not allowed to land by the master of said steamer upon the claim that under provisions of the Act of May 6, 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese," he has no right to land.

The return of the master of the steamer admits the allegations of the petition as to the embarkation of this petitioner at Panama and his arrival at this port, but disavows all knowledge or information sufficient to enable him to admit or deny the allegation of this petitioner that he is a Chinese merchant and not a Chinese laborer.

But he claims that the petitioner cannot lawfully land in the United States by reason of the non-production by him to the Collector of the certificate of identification, etc., and by said Act of May 6, 1882, required to be produced by every Chinese person other than a laborer arriving in the United States.

On the hearing the truth of the allegations of the petition was established beyond doubt or controversy. It appeared that the petitioner is, as he claims to be, a Chinese merchant residing in Panama; that the firm in this city, of which he is a member, is largely engaged in commerce, and that his object in visiting San Francisco was to make purchases for his establishment at Panama, and to adjust his accounts with his partners in this city. The proofs offered by petitioner were corroborated by his dress, appearance, and manners. He evidently did not belong to this class of Chinese laborers or coolies which the treaty and the Act of Congress intended to exclude; but, on the contrary, he belongs to a class which, by the express terms of Article II of the treaty, are allowed to go and come "of their own free will and accord," and to enjoy "all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation."

But it is strenuously urged by the District Attorney that under the provisions of the 6th section of this Act no evidence is admissible to prove the petitioner not to belong to the prohibited class, except the production of the certificate of identification therein required, and that the failure to produce such a certificate raises a conclusive presumption that the person so failing to produce it is a Chinese laborer.

He even contends that an indictment against the master for landing, or permitting to land, a Chinese laborer would be sustained by proof, that the person so landed did not produce to the Collector the certificate of identification required by Section 6.

The argument chiefly pressed by the District Attorney in support of this construction was, that to admit parol evidence as to the character of the immigrant would open the door to endless evasions of the Act, and that any Chinese laborer could procure any number of witnesses who would swear him to be a merchant, student, teacher, or traveler from curiosity, and that this testimony the United States would rarely be able to controvert.

The suggestion is not without force, though the danger is, I think, exaggerated. It would not be easy, in all cases, for a Chinese laborer or coolie, whom alone it was the intention of the Act to exclude, to simulate the dress, manners, and general appearance and bearing of the merchant, student, teacher, or traveler, who, in China almost as much as in India, are separated from the common laboring classes by social and external differences which almost amount to a distinction of caste.

But even if the apprehensions of the District Attorney were well founded, the construction he contends for would be inadequate to prevent the evil, unless we also hold that on an indictment against the master or a libel against the ship, the non-production of the certificate shall be conclusive evidence that the passenger landed is a laborer. For if the master or the claimant of the vessel be allowed to show his true character by parol, the door would be opened to all the evasions of the law which the District Attorney fears.

Section 6 is as follows: "That in order to the faithful execution of articles one and two of the treaty in this Act before mentioned, every *Chinese person* other than a laborer who may be entitled by said treaty and this Act to come within the United States and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title or official rank, if any, the age, height and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the

certificate is issued, and that such person is entitled conformably to the treaty in this Act mentioned to come within the United States. Such certificate shall be *prima facie* evidence of the fact set forth therein, and shall be produced to the Collector of Customs or his deputy, of the port in the district of the United States at which the person named therein shall arrive."

It will be observed that the terms of this section lend no support to the position taken by the District Attorney. A certificate of identification is, it is true, required to be produced to the Collector, but it is not provided that the Chinese person failing to produce it shall not be allowed to land—much less that the certificate shall be the only proof of the right of the passenger to come within the United States, and that in its absence he shall be conclusively presumed to be a Chinese laborer and that this presumption exists even in a criminal proceeding against the master for "landing or permitting to land a Chinese laborer."

In the debates in the Senate on the original bill which contained provisions nearly identical with those of Section 6, in the bill which obtained the President's approval, it was strenuously urged that to exact a compliance with "the cumbersome and burdensome provisions" with regard to certificates of identification and which are required of the subjects of no other power was a violation of the treaty which allows the permitted classes to go and come of their own free will and accord, and which guarantees to them all the rights, privileges, immunities and exemptions accorded to the citizens and subjects of the most favored nation. To this it was replied that the provisions in the bill were merely for purposes of identification; that they were in the interest of the classes permitted to come; that it was no hardship to the permitted classes to leave it to the Chinese Government to say who are merchants, traders, teachers, etc., and therefore not within the excluded class.

But if the bill had declared, or had been supposed to declare, by necessary implication, that no Chinese person unprovided with a certificate should, under any circumstances, be allowed to land, and that its *non-production* should be conclusive evidence that the passenger was a Chinese laborer, while its *production* should only be *prima facie* evidence of the facts set forth therein, the bill might have encountered an opposition which would have endangered its passage.

The circumstances of the case before us do not require a definitive decision of the question whether a Chinese merchant, teacher, etc., arriving from China, and failing to produce the certificate required by Section 6 might not overcome by satisfactory evidence of his real character the presumption, that he is a laborer, raised by the absence of the certificate, and establish the right secured by the treaty to go and come of his own free will and accord.

The petitioner has been for many years a resident of this city, of Callao, and latterly of Panama. He comes to the United States on a temporary visit for purposes of trade. At the time of his embarkation on board an American vessel at Panama, the law which requires the production of a certificate had not gone into effect.

By referring to the terms of Section 6, which have been cited, it will, we think, be apparent that the persons contemplated in its provisions are Chinese merchants, etc., coming *from China* to the United States, and not Chinese merchants coming to this country from other parts of the world.

The certificate is to be furnished by the Chinese Government, or under its authority. It must state the name, age, height, and all physical peculiarities, former and present occupation, and *place of residence in China*, of the person to whom it is issued.

How could a Chinese merchant who has resided, it may be for ten or twenty or thirty years, in London or Calcutta or Callao or Panama, obtain such a certificate?

Certainly not without going to China for the purpose. And how if he should revisit his country with that object, could the certificate state, as required, his place of residence in China?

The evil which the treaty and the law were intended to remedy, was the unrestricted immigration from the teeming population of China of laborers, whose presence here in overwhelming numbers was felt by almost all thoughtful persons to bear with great severity upon our laboring classes, and to menace our interests, our safety, and even our civilization.

But while anxious to attain this end, an equal solicitude was felt to adopt no legislation which should violate the plighted faith of the Nation, unnecessarily give offense to the Chinese Government, or hinder or impede our large and growing commerce with China.

Congress may therefore reasonably be supposed to have thought that the great object of the bill would be sufficiently attained by exacting certificates of identification from Chinese emigrants from China, from whence the great influx of laborers was feared, and from whence it chiefly comes. And it may have advisedly refrained from imposing the same requirement upon Chinese merchants, etc., residents in other countries, a requirement which it would be almost impossible for them to fulfill; nor can we suppose that the Chinese Government would regard such an exaction, which practically excludes all their subjects residing abroad from coming to the United States, as a reasonable or even honest compliance with the treaty stipulation, which guarantees to Chinese merchants, etc., the right to come and go of their own free will and accord.

In the case before us, not only was it impossible for the petitioner to obtain the certificate required, but at the time he embarked on board an American ship at Panama, no law was in

operation requiring him to do so. If he is not permitted to land it will not be because he has no right to do so, under the treaty, for he has clearly and indisputably shown that he does not belong to the excluded class—but because he does not produce evidence which it was impossible for him to procure and which when, by embarking on board an American ship he came under our flag and within our jurisdiction, he was not required by any law then in effect to obtain.

We are clearly of opinion that the case is not within the provisions of the 6th Section of the Act.

Some further observations may not be inappropriate.

It is well known that the law under consideration encountered wide spread and vehement opposition. It was attacked as the servile echo of the clamors of the sand lot—as fraught with danger to our commercial relations with China; as inconsistent with our national policy; as obstructing the spread of Christianity, and as violative not only of the treaty, but of the inherent rights of man.

It was defended as absolutely indispensable to the preservation of our local and political system, and even to our safety. Nothing would more gratify the enemies of the bill than that in its practical operation it should be found to be unreasonable, unjust and oppressive. If Chinese merchants coming here from all parts of the world are excluded because they fail to produce a certificate impossible for them to obtain; if a merchant long resident here and on his way to New York by a route which for a short distance passes through Canada is to be stopped at Niagara bridge for want of a certificate, and on retracing his steps is to be stopped at Detroit on a similar pretext, and on the ground that in each case he is to be regarded as coming to the United States from a foreign country, within the true intent and meaning of the treaty and the law; if a Chinese merchant similarly resident in this city and desirous of temporarily visiting British Columbia or Mexico is to be refused, as it seems he must be, a certificate by the Custom House authorities, under Section 4, on the ground that he is not a laborer, and on his return, after a few weeks absence, is to be prohibited from landing on the ground that he has no certificate of identification issued by the Chinese Government under Section 6; if, in these and similar cases, the operation of law is found to work manifest injustice, oppression, and absurdity its repeal cannot long be averted.

I am satisfied that the friends of this law do it the best service by giving to it a reasonable and just construction, conformable to its spirit and intent and the solemn pledges of the treaty, and not one calculated to bring it into odium and disrepute.

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Current Topics.

SUNDAY LAW AND SMOKERS.

In the case of *Carver vs. The State*, 69 Ind. 61, the Court, in delivering its opinion, said: "There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any lawful habit on Sunday, the same as there is on a work-day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sundays the same way that it is usually kept on a week-day, and if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders, and customers on a week-day, to sell cigars from the same stand, in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer on Sunday for pay."

If this be true, then it is not unlawful to sell liquors of all kinds from a bar kept as a part of the hotel, to any person making application, whether guests of the hotel or other persons. If the saloon is a part of the hotel as the cigar stand was, those purchasers of drinks would then be "customers" of the hotel; this decision seems, by the use of the words "guests, boarders, and customers" to include the general public. Can it be said that smoking, to those who have acquired the habit, is any more a necessity than drinking whiskey would be to the toper?

Mere personal torts die with the party and are not assignable; but where injuries affect the estate rather than the person, they are assignable, and the assignee may sue in his own name.—*Galveston, Harrisburg, and San Antonio Railroad Company vs. Freeman*, Supreme Court, Texas, 1882.

Supreme Court of California.

IN BANK.

[Filed September 22, 1882.]

No. 10,768.

PEOPLE, RESPONDENT, vs. CHEE KEE, APPELLANT.

ALMANAC—JUDICIAL NOTICE—SUN—EVIDENCE. An objection to "Dr. Ayer's American Almanac," to prove the time when the sun rose on the morning of a particular day, properly overruled.

Id.—Id. As the Court could take judicial notice of such fact, formal proof of it was unnecessary. It would have been sufficient to have called it to the knowledge of the Judge at the trial, and if his memory was at fault, or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac or any other book of reference for the purpose of satisfying himself about it; and such knowledge would have been evidence.

PRACTICE—OBJECTION—EXCEPTION—APPEAL. A general objection to the admission of evidence is insufficient. A party objecting to evidence must specify the ground of his objection; if he does not, there is no error in overruling his objection; and an exception taken to the ruling is not revisable on appeal.

Appeal from Superior Court, San Francisco.

Alexander Campbell, Jr., for appellant.*Attorney-General Hart*, for respondent.

McKEE, J., delivered the opinion of the Court:

At the trial of the defendant upon an information against him for the crime of burglary, charged to have been committed in the city and county of San Francisco on March 20, 1882, the District Attorney offered in evidence "Dr. Ayer's American Almanac for 1882," to prove the time when the sun rose on the morning of that day. To the offer the defendant objected generally, without stating any ground of objection; and upon the overruling of the objection he excepted.

The fact, for the proof of which the almanac was offered, was one of those facts of which a Court may take judicial notice; formal proof of it was therefore unnecessary. It would have been sufficient to have called it to the knowledge of the Judge at the trial; and if his memory was at fault, or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac, or any other book of reference for the purpose of satisfying himself about it (Sub. 8, Sec. 1875, C. C. P.); and such

knowledge would have been evidence. (Sec. 1827, Id.; *Page vs. Faucet*, Cro. Eliz. 227.)

Besides, a general objection to the admission of evidence is insufficient. (*People vs. Apple*, 7 Cal. 279; *People vs. Glenn*, 10 Id. 33.) A party objecting to evidence must specify the ground of his objection (*People vs. Manning*, 48 Id. 335); if he does not, there is no error in overruling his objection; and an exception taken to the ruling is not revisable on appeal. (*Winans vs. Hassey*, 48 Id. 635.)

Judgment and order affirmed.

We concur: Morrison, C. J., Thornton, J., Myrick, J. Ross, J., McKinstry, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed September 20, 1882.]

No. 8287.

OLIVAS ET AL., RESPONDENTS, vs. OLIVAS, APPELLANT.

TRUST—FRAUD—EQUITY—DEED—WILL—REMEDY—MISREPRESENTATIONS—CHILDREN. Bill to establish a trust, the substance of which was that plaintiffs, children of a testator who had executed a will devising and bequeathing his property to defendant, his widow and mother of plaintiffs, had, within one year after probate of the will and before the order of final distribution was made by the Probate Court, filed their petition praying a revocation of the will and opposing distribution in accordance with the terms of the will, on the ground that testator had failed to make any provision for them in his will, etc. In consideration of plaintiffs' withdrawal of opposition to distribution, defendant agreed to accept a life estate in the premises, reserving to plaintiffs the reversion, and that plaintiffs should have the proper shares in the rents and profits for their support during the life of defendant, etc. The deed of grant to defendant was, through the misrepresentations, etc., of defendant, made of the fee instead of for a life estate, under which defendant has since continued in possession of the whole interest of plaintiffs, and has not paid to plaintiffs any portion of the rents and profits. *Held*, plaintiffs were entitled to a decree that defendant held the property in trust for plaintiffs to the extent of their interests therein, etc.

Id.—*Id.* There was a substantial conflict in the evidence upon the material points in the case.

Id.—*Id.* The remedy of plaintiffs was not a bill to reform the deed so as to make it express the intention of the parties. Plaintiffs did not rely upon a mutual mistake, but the gravamen of their complaint is fraud practiced by defendant in obtaining the execution of the deed, coupled with the additional averment that defendant has wholly neglected to comply with the terms and conditions upon which the deed was executed. The facts were sufficient to justify the Court in setting aside and cancelling the deed.

Id.—*Id.* The fact that the fraud was discovered in time for plaintiffs to have availed themselves of it in the Probate Court does not affect the plaintiffs' right to relief in a Court of equity. This is a direct attack upon the deed, founded upon fraud in obtaining its execution.

Id.—Id. Admitted that plaintiffs could have gone into the Probate Court and could there have successfully opposed the order of distribution, it does not follow that they did not have a right to go into a Court of equity for the purpose of setting the deed aside on the ground of fraud.

Appeal from Superior Court, Ventura County.

Hall & English and *Williams & Williams*, for appellant.

Bledsoe & Pettinos, *Hamer* and *Brooks*, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

This was a proceeding to establish a trust in favor of the plaintiffs, and against the defendant, in certain property situate in the county of Ventura. The principal facts, out of which it is claimed the trust arises, are fully set out in the findings of the Court, and to these findings we will refer.

The plaintiffs are two of the children and the defendant is the widow of the late Raymundo Olivas, who died on the 21st of February, 1879, and who was, at the time of his death, seized of an estate valued at fifty thousand dollars, or thereabouts. On the 29th of March, 1879, the last will and testament of Raymundo Olivas was admitted to probate in the Probate Court of Ventura County, and on the 20th of October, 1880, a final order of distribution of the estate was made by the Court. By his will the deceased devised and bequeathed all of his estate, of every character, to the defendants, and did not therein mention the name or names of any of his children. On the 17th of March, 1880, within one year after the probate of the will and before the order of distribution was made, the plaintiffs filed their petitions in the Superior Court (which had succeeded to the jurisdiction of the former Probate Court of Ventura County), praying for a revocation of the probate of the will, and opposing a distribution of the estate in accordance with the terms of the will, on the ground that the testator had neglected to make any provision for them, or to mention them in his will, and the defendant was duly cited to appear and answer said petition. The Court then finds:

“VI. That upon the day fixed by said Superior Court, for the hearing of said contest and said opposition, the defendant sought out plaintiff Refugia and requested and begged her not to proceed with her said contest to revoke the probate of said will, and to withdraw her opposition to the distribution of the estate of her father to the defendant, and then and there proposed to and promised said plaintiff Refugia that if she would withdraw her contest and opposition to distribution, and would execute, acknowledge and deliver to

her, defendant, a deed conveying to defendant her interest in said estate, for and during the life of defendant, reserving to herself (plaintiff) the reversionary interest therein, that she, plaintiff, should be entitled to and should have her proper share and proportion in the rents and profits of said estate for her support during the life of defendant; and as a further consideration and inducement, defendant also agreeing to advance immediately to plaintiff Refugia, the sum of \$500, with which to buy her a home, or to purchase for her a house and lot in the town of San Buenaventura."

"VII. That reposing trust and confidence in her mother (the defendant), and believing her said representations and promises, plaintiff Refugia, in connection with her brother (plaintiff Luis Olivas), was induced by said promises to, and did, on the 20th day of March, 1880, execute, acknowledge and deliver to her mother (the defendant) a deed of grant, bargain and sale, purporting to convey to defendant in fee all the interest of the plaintiff Refugia in and to the estate of her deceased father for the consideration therein expressed of one dollar. That said deed was prepared by a Notary Public, being at the same time the attorney of the defendant and wholly under her direction, and was and is written in the English language, whereof plaintiff was and is entirely ignorant, being then and now unable to read, write or speak it; nor could she then or now read or write her mother tongue—the Spanish. That before and at the time of the execution of said conveyance, defendant intending to deceive, mislead and defraud plaintiff out of her interest in the estate of her father, caused said conveyance to be read and translated in the Spanish language, as a conveyance of plaintiff's interest in the estate of her deceased father to defendant for life, and not as a conveyance in fee. That the Notary Public in taking the acknowledgment thereto, did not truly make her acquainted with the contents of said deed, but read and translated the same in such manner as to induce and lead plaintiff to believe therefrom that it was a conveyance to defendant for her natural life only, of the interest of plaintiff Refugia in the Rancho San Miguel, with reversion back to plaintiff on the death of defendant."

Finding XI relates to the plaintiff Luis Olivas, and is similar to findings VI and VII in respect to the other plaintiff.

"Finding XII. That the defendant intending and contriving to defraud plaintiff, and to deprive him of his share in the estate of his deceased father, did on the 20th day of March, 1880, caused to be prepared a deed, absolute on its face, conveying to her (defendant) in fee, all of plaintiff's

interest in the Rancho San Miguel, and not a life estate therein as agreed; said deed being in the English language, which language plaintiff could neither read, write or speak. That intending to deceive, mislead and defraud plaintiff, defendant caused said deed to be read and translated to plaintiff in the Spanish language (his mother tongue, but which he could not read or write), in such manner as to cause plaintiff to think and to believe that it was a conveyance for life, and not of any other or greater interest. That said deed was read and translated to him by the Notary who took his acknowledgment at the same time and to the same effect as his sister Refugia, as stated in Finding VII. That confiding in the representations of his mother, the defendant, and believing such false and fraudulent representations and promises of defendant, he, the plaintiff, did on the twentieth day of March so execute and deliver said conveyance to defendant."

"Finding XIV. That ever since the date of the execution and delivery of said deed by plaintiffs, Refugia and Luis, to defendant, defendant has been and now is in possession of the whole interest of both and each of plaintiffs in the estate of their deceased father, and has not paid or delivered to plaintiffs, or either of them, any part or portion of the rents, issues, and profits thereof."

On the foregoing and other findings of fact, the following were the conclusions of law:

"1st. That plaintiffs, Refugia Olivas de Lombardo and Luis Olivas, are entitled to a decree that defendant, Teodora Lopez de Olivas, holds the real estate of Raymundo Olivas, deceased, to wit: the east half of the Rancho San Miguel, in trust for plaintiffs, Refugia and Luis, to the extent of their interests therein.

"2d. That defendant be required to convey to plaintiffs, by deed of grant, bargain and sale, their respective undivided interests therein as conveyed by them to defendant by their deed dated March 20, 1880, or, that in default of such conveyance for the period of thirty days, a Commissioner of this Court do it for her.

"3d. That defendant account to plaintiffs for shares of the rents, issues, and profits of said real estate since October 2, 1880, corresponding to their respective interests therein.

"4th. That plaintiffs have judgment for their costs of suit."

There was a demurrer to the complaint, which was overruled by the Court, and on this, the first assignment of

error is predicated. The complaint set out substantially all the facts found by the Court, and was sufficient to constitute a cause of action against the defendant. (Kerr on Fraud and Mistake, 80; Story's Eq. 190, b.)

There are three points made by the appellant which we deem it necessary to notice, the first being that the findings of the Court were contrary to the evidence. This ground of objection is answered by the fact that there was a substantial conflict in the evidence upon the material points in the case; and the rule is well settled that when such conflict exists, this Court will not interfere with the judgment of the Court below. The question is not what would have been our opinion of the facts, if the case had been tried before us, but it is simply whether there was sufficient evidence to justify the Court below in holding as it did, although we may be satisfied that there was a preponderance of evidence on the other side. The findings of the Court are sustained by the testimony of at least two witnesses, and it was the exclusive province of the trial Court to pass upon the credibility of the witnesses. The rule has been settled by so many adjudicated cases in this Court, that it is unnecessary to do more than refer to it.

2. The second point made by appellant is, that the remedy of the respondents was by a bill in equity to reform the deed, so as to make it express the intention of the parties. If the respondents had relied simply on a mutual mistake, there would, perhaps, be some ground on which to base appellant's proposition. But the gravamen of respondents' complaint is fraud, practiced by the appellant in obtaining the execution of the instrument, coupled with the additional averment that the defendant, appellant, has wholly neglected to comply with the terms and conditions upon which the deed was executed. We think that the facts found by the Court were sufficient to justify it in making the decree complained of, which, in effect, sets aside and cancels the deed.

3. The third point is that the fraud complained of was discovered in time for plaintiffs to have availed themselves of it in the Probate Court. We cannot perceive how this fact in any manner affects the plaintiffs' right to relief in a Court of equity. This is a direct attack upon the deed, founded upon fraud in obtaining its execution, and there cannot be any doubt that such a proceeding will be maintained in a case where fraud in procuring the execution of an instrument is established to the satisfaction of a Court of equity. It may be admitted that the plaintiffs could have

gone into the Probate Court, and could there have successfully opposed the order of distribution; but it by no means follows therefrom, that they did not have a right to go into a Court of equity for the purpose of setting the deed aside on the ground of fraud.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed September 7, 1882.]

No. 10,767.

PEOPLE, RESPONDENT, vs. CHIN AH HONG, APPELLANT.

ALIBI—NEW TRIAL—AFFIDAVIT—NEWLY DISCOVERED EVIDENCE. Defendant attempted to establish an *alibi*. On motion for a new trial on the ground of newly discovered evidence, an affidavit was used, which, considered as averring that defendant was not present when the prosecuting witness was beaten, the Court holds to be cumulative evidence. *Further:* Such affidavit does not distinctly state that defendant took no part in the assault charged.

Appeal from Superior Court, San Francisco.

Alex. Campbell, for appellant.

Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The defendant attempted to establish an *alibi*; he, himself, and his principal witness, swearing that he was not at the scene of the assault.

The affidavit of McFadden, used on the motion for a new trial, if it be considered as averring that defendant was not present when the prosecuting witness was beaten, is merely cumulative evidence. But the affidavit does not distinctly state that defendant took no part in the assault. McFadden says: "Two Chinamen came behind Lee Wing (prosecutor), one pulled him back and the other struck him." *Further:* "Affiant is positive Chin Ah Hong is not the man who struck Lee Wing."

If both took part in the assault, it is immaterial whether defendant "pulled him back" or struck him.

Judgment and order affirmed.

We concur: Ross, J., Sharpstein, J., Mryick, J., Morrison, C. J.; McKee, J., Thornton, J.

IN BANK.

[Filed September 20, 1882.]

No. 10,673.

PEOPLE, RESPONDENT, VS. HONG AH DUCK, APPELLANT.

PUNISHMENT—CONVICT—DEATH PENALTY—HOMICIDE—EVIDENCE—VERDICT—LIFE IMPRISONMENT—JURY. Upon a trial of defendant charged with homicide, evidence of the fact that he is suffering life imprisonment under a prior conviction is admissible for the purpose of aiding the jury in the exercise of the discretion given them by statute of imposing the death penalty or life imprisonment upon a finding of murder in the first degree.

ID.—ID. If it be true that a verdict fixing the punishment at imprisonment for life would in effect be no punishment at law, it is proper to inform the jury of that fact.

HOMICIDE—INFORMATION. It is not necessary that the means by which life was taken should be stated in an information for murder.

THREATS—EVIDENCE—TIME. A witness testified that defendant held up a "dead chicken" in his right hand and said: "If I don't kill Ah Mow (deceased), I am dead like this chicken." The witness did not state the precise time when the threat was made, but said, "I could not tell the exact date—about a month before he killed Ah Mow." *Held*, the testimony being admissible for the purpose of showing malice, its competency was not affected by lapse of time.

ID.—ID. Evidence to show that a certain Chinaman was known by the name of China Tom, and another opprobrious name, *held* properly excluded.

ID.—ID.—EXPERT—WOUNDS. Evidence of a person asked to describe a wound which he saw on the hand of deceased, *held* not subject to objection because witness was not an expert in the matter of wounds.

ID.—ID.—BLOODY CLOTHING. The bloody clothing of deceased, *held* properly admitted in evidence. It is a practice, not at all uncommon, to offer in evidence the bloody clothing worn by deceased at the time of the homicide, and sometimes it may be important evidence in the case, as a part of the *res gestæ*.

ID.—WITNESS IN COURT. The action of the Court in permitting a witness to remain in the Court-room, is the exercise of a discretionary power residing in the Court.

ID.—CORONER'S INQUEST. The statement made by defendant at the Coroner's inquest was admissible for the purpose of contradicting his testimony in the case.

INSTRUCTIONS. The Court is not bound to state the law more than once to the jury.

ID.—BURDEN OF PROOF. Section 1105 of the Penal Code, which throws on the defendant the burden of proving circumstances of mitigation, or circumstances that justify or excuse the killing in certain cases, requires that the proof on the part of the defendant shall be in some degree stronger than the proof on the part of the prosecution. In other words, it must preponderate.

Appeal from Superior Court, Marin County.

McJunkin and Crowley, for appellant.

Attorney-General Hart, for respondent.

Morrison, C. J. delivered the opinion of the Court:

The defendant was prosecuted by information, for the crime of murder, and was convicted of that crime in the first degree. The jury failed to fix the punishment, and sentence of death was passed on him by the Court. The record presents a great many exceptions taken to the rulings of the Court, during the progress of the trial, and also several exceptions relating to instructions given and refused, which we will notice in the order in which they are presented.

But the first point in the case relates to the sufficiency of the information. It fails to state the means by which the defendant took the life of Ah Moy, the deceased—whether the homicide was perpetrated by shooting, stabbing, poisoning or otherwise. In all other respects the information is sufficiently certain, and clearly charges an act of murder in the first degree. The question then arises, is it necessary for the pleading, whether it be an indictment or an information, to set forth and describe the weapon used and the wound inflicted, or the other means employed to take human life? This question has been considered in several cases in this State, and in all of them it has received a negative answer. The question of the sufficiency of an indictment under our Criminal Code was fully considered by Sanderson, C. J., in the case of *People vs. King*, 27 Cal. 511; and it is there said: "Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment as to the means used by him in committing the act or the manner in which it was done, for, as to both, his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense." The learned Judge then proceeds to discuss the relaxation of the common law rule, and to show what is necessary for an indictment to contain under the new system of rules introduced by the Criminal Codes.

The case of *The People vs. Cronin*, 34 Cal. 191, is to the same effect, and it was there held that an indictment charging the homicide to have been committed "by some means, instruments, and weapons to the Grand Jury unknown," was sufficient. The doctrine of the *Cronin* case is sustained by the latter case of *The People vs. Martin*, 47 Id. 101, and we see no good reason for rejecting it at this late day. Section 960 of the Penal Code declares that "no indictment or information is insufficient * * by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant, upon its merits." We are of the opinion that the information substantially conforms to the requirements of the Code, and that the demurrer thereto was properly overruled.

2. The second question in the case relates to the admission in evidence of certain threats made by the defendant against the deceased. The witness testified that the defendant held up a dead chicken in his right hand and said. "If I don't kill Ah Mow, I am dead like this chicken." The witness does not state the precise time when this threat was made, but simply says, "I could not tell the exact date—about a month before he killed Ah Mow."

We do not understand upon what principle of law such evidence could be considered incompetent; and that it was clearly admissible might be shown by a large number of adjudged cases. "The testimony as to the threats made by the defendant were competent, notwithstanding they were made a long time prior to the commission of the homicide. Testimony of that character was admissible for the purpose of showing malice, and its competency is unaffected by the lapse of time, though its weight may be impaired." (*People vs. Cronin*, *supra*, and cases referred to therein.)

3. An effort was made on behalf of the defense to show that a certain Chinaman of the name of Ah Pon was known by the name of China Tom, and also by another opprobrious name. Objection was made to the evidence by the prosecution, and the objection was sustained by the Court. It does not appear to us what the object of the defense was in seeking to get the evidence before the jury, and we cannot see what bearing it had upon the case. It was properly excluded.

4. One Thompson was called as a witness on behalf of the prosecution, and was asked to describe a wound which he saw on the hand of the deceased. To this question objection was made by the defense on the ground that the witness was not an expert. It was not necessary that he should have

been an expert in the matter of wounds. He was simply asked to describe a wound inflicted by a knife on the hand of the deceased, which wound, he, the witness, saw, and there was no legal objection to his describing it.

5. The bloody shirt of the deceased was offered in evidence by the prosecution, against defendant's objection. It is a practice, not at all uncommon, to offer in evidence the bloody clothing worn by the deceased at the time of the homicide, and sometimes it may be important evidence in the case, as a part of the *res gestæ*.

6. We now come to a point in the case upon which serious doubts were entertained by us for a time, but after examination and reflection, we have been enabled to arrive at a satisfactory conclusion respecting it. It has already appeared in the case that both the defendant and the deceased were inmates of the State Prison; that upon the day of the homicide the defendant had been engaged in the performance of a certain labor task, imposed upon him in company with other convicts; that the term of service of the deceased had nearly expired—but what the term of defendant's sentence was had not appeared. The prosecution then offered to show that the defendant was a life-long convict; to the introduction of evidence on this point defendant, by his counsel, objected. A very lengthy argument then ensued, for and against the introduction of the evidence, and the result was a decision of the Court below in favor of its competency. This ruling is assigned as error. The evidence was not offered as affecting in any manner the question of defendant's guilt; such a purpose was disclaimed by the prosecution, and was clearly guarded against by instructions of the Court to the jury. The object of the evidence was simply to give the jury to understand that if they found the defendant guilty of murder in the first degree, *and fixed his punishment at imprisonment for life* (which they could do under the provisions of the Penal Code), there would be no addition to the punishment to which the defendant was already condemned, under a former conviction. The Court instructed the jury that they could not find the defendant guilty of any crime if they had a reasonable doubt of his guilt, and explained the meaning of the term reasonable doubt, as the same was defined by the learned Chief Justice Shaw in the Webster case. The Court further told them that if they believed the defendant guilty of murder, but had a reasonable doubt as to the degree, whether murder in the first degree or in the second, it was their duty to find him guilty of the lesser of the two offenses. The charge in

respect to the degree of crime of which the defendant might be found guilty, and the measure of proof required to establish his guilt was very clear, full, and satisfactory, and there remains for our consideration simply the question of alleged error claimed to have been committed by allowing the prosecution to prove the prior conviction and sentence of the defendant to a life-long term in the State Prison.

The question is a new one in this Court, and we are not aware of any direct authority upon it. The nearest approach to it which we have been able to find is the case of *Field vs. The State*, 47 Ala. 603, and the case of *Kistler vs. The State*, 44 Ind. 400. In the *Field* case it was held, that, "on a trial on an indictment for murder under the statutes of that State the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and severity of the punishment to be inflicted. Evidence, therefore, of the general bad reputation of the deceased, as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant, and proper evidence, although under the circumstances of the particular case it may not be sufficient to reduce the offense from murder to manslaughter, to enable the jury to determine the degree of the offense, and the character and measure of the punishment." In the above case it was held that under the Alabama statute, it was permissible to go into a collateral inquiry for the purpose of aiding the jury in determining the degree of punishment. That statute is similar to ours, leaving the matter of punishment within the discretion of the jury, in cases of conviction of murder in the first degree.

The case of *Kistler vs. The State*, 54 Indiana, 400, has some bearing on the question now under consideration. The Court there says:

"According to the old law, all the jury had to do was to determine the question of guilt or innocence. It was the duty of the Court, after a verdict of guilty, to declare the punishment which the law imposed. If any discretion was permitted as to the punishment, that discretion was exercised by the Court alone. Circumstances, whether in aggravation or in mitigation, were considered by the Court when brought to its attention by the evidence.

"We think it still the correct practice, where it devolves on the Court to determine the punishment, either upon its own finding or on a plea of guilty, for it to hear evidence in aggravation or in mitigation, as the case may be, where there is any discretion as to the punishment.

"In our present Criminal Code it is enacted that, 'When the defendant is found guilty, the jury must state in their verdict the amount of fine and the punishment to be inflicted.' (2 R. S. 1876, p. 404, Sec. 116.)

"This is, in substance, a re-enactment of what has long been the law in our State. Hence, our juries, in criminal causes, are not only required to determine the punishment, where there is a verdict of guilty, but are also invested with all the discretionary power in regard to such punishment that formerly belonged exclusively to, and which under certain circumstances is still exercised by the Courts. While punishing the guilty, they are, equally with the Courts, required to see to it that no cruel and unusual punishments are inflicted, and that all penalties are proportioned to the nature of the offense.

"In considering the question of the nature or the extent of the punishment, the juries are now fairly entitled to all the latitude which the Courts have rightly exercised, in hearing evidence tending to enlighten them in the exercise of a sound judicial discretion."

In order to exercise that discretion in a wise and intelligent manner, the jury should be put in possession of all the facts of the case, and if it be true, as it was in respect to this defendant, that a verdict fixing the punishment at imprisonment for life, would in effect be no punishment at all, we think it was proper to inform the jury of that fact.

7. The action of the Court in permitting Captain Edgar, a witness in the case, to remain in the Court-room, was simply the exercise of a discretionary power residing in the Court, and it was not error.

8. Other objections to the ruling of the Court in admitting in evidence matters which were objected to on behalf of the defense, were not well taken, and it is not necessary for us to consider these matters separately. The statement made by the defendant at the Coroner's inquest was admissible in evidence for the purpose for which it was read, that is to say, for the purpose of contradicting the defendant, who offered himself as a witness in the case.

9. There remains only one more matter to be considered, and that relates to the action of the Court in charging the jury, and in refusing to give certain instructions requested by the defendant. It is unnecessary for us to inquire into the correctness of the instructions refused by the Court, for the reason that the charge was full enough to cover, and did cover, all the points of law applicable to the case, and we have held in several cases, that the Court was not bound to state the law to the jury more than once.

The Court instructed the jury as follows: "The killing being proved, the burden of proving circumstances of mitigation to justify or excuse the homicide will devolve on the accused, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide. Up to the moment when the killing is proved, the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify, by a preponderance of evidence on his part. That is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes * * * It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side."

It is claimed, on behalf of the defense, that there is error in the foregoing instruction. Section 1105 of the Penal Code provides that, "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

If the Court had instructed the jury that the *burden of proof* rested upon the defendant, instead of telling them that the defendant was required to prove his justification or excuse by a *preponderance* of evidence, the instruction would have been in the language of the section of the Code above cited. Was there any difference in the meaning between the instruction given in the language of the Code? It is a general rule of evidence that an affirmative proposition must be established by a preponderance of evidence; for, if the evidence on one side is equally balanced by the evidence on the other, there is a failure of proof, and the requirements of the law are not complied with. That question has been passed upon in a number of cases, the first of which we will notice is that of *The People vs. Milgute*, 5 Cal. 127, in which the Court says: "The homicide being admitted or proved, the law raises the presumption of malice, which it is necessary for the prisoner to rebut by proof. Proof beyond a reasonable doubt is necessary to establish a fact against a prisoner; but preponderating proof, proof necessary to satisfy a jury of the fact, is

sufficient to establish the fact, in his favor." The case of *The People vs. Stonecifer*, 6 Id. 405, is to the same effect, and the rule is there stated in the following language: "The second instruction is bad, because, the killing being admitted, the presumption of guilt arises, and the *onus* is laid upon the prisoner of disproving the guilt; this cannot be done by raising a doubt in the minds of the jury, but by establishing the fact by preponderating proof." In the case of *People vs. Arnold*, 15 Cal. 476, Mr. Justice Baldwin says: "When the fact of a homicide is shown, then it is incumbent upon the defendant to show, by a preponderance of testimony, that the killing was justifiable." These cases are to be read in the light of the fact that there is no evidence in the case made by the prosecution tending to show a state of facts which justify the killing, or which reduce the crime to manslaughter. (*People vs. West*, 49 Cal. 610.) In the case of the *Commonwealth vs. York*, 9 Metcalf, 124, Chief Justice Shaw says: "The proof establishing the necessity for taking life, in self-defense, must be satisfactorily made out. Raising a doubt would be insufficient." (See, also, *People vs. Schryver*, 42 N. Y. 1.)

But it is unnecessary to pursue this branch of the case any further. We are of the opinion that Section 1105 of the Penal Code, which throws on the defendant the burden of proving circumstances of mitigation or circumstances that justify or excuse the killing in certain cases, requires that the proof on the part of the defense shall be, in some degree, stronger than the proof on the other side; or, in other words, that it must preponderate.

There is no error in the proceedings injuriously affecting any substantial right of the defendant, and the judgment and order are therefore affirmed.

We concur: Myrick, J., Thornton, J., McKee, J.

IN BANK.

[Filed September 21, 1882.]

No. 7802.

CHANDLER, APPELLANT,

vs.

PEOPLE'S SAVINGS BANK ET AL., RESPONDENTS.

LIEN—SALE—WAIVER—PLEDGE—ASSIGNMENT. A sale by the holder of an exclusive lien on personal property, who also holds a prior and subordinate lien on real property as security for a debt, of the real property under its prior lien, looking to the personal security for pay-

ment of the balance, operates, after satisfaction of the prior lien, a waiver of any right it might have had to first exhaust the personal security in satisfaction of its prior lien, before proceeding to sell the land on which the prior and subordinate liens rested.

Id.—Id. In such case the undisposed of surplus of the personal security belongs to the pledgor or his assignee.

Id.—Id. The interest of a pledgor of personal security is assignable.

Appeal from Superior Court, Sacramento County.

Beatty, Beatty, and Beatty, for appellant.

Freeman & Bates, and McKenna, for respondents.

McKEE, J., delivered the opinion of the Court:

Samuel Poorman, being indebted to the Capital Bank of Sacramento by a promissory note for \$15,000, secured its payment by a deed of trust made to the bank for two hundred acres of land near the city of Sacramento, and by two negotiable promissory notes, which he assigned to the bank—one made by L. C. Chandler, the plaintiff in this case, for \$6,000, secured by mortgage upon real property, and the other by one Todhunter for \$4,000. The Todhunter note was taken up when it fell due, and the amount was credited by the bank on Poorman's note, leaving due and unpaid upon it, in April, 1879, a balance of about \$12,288. Upon receipt of that sum the bank, at that date, assigned and transferred the note itself and its securities to one Smith, who afterwards, for a valuable consideration, assigned and transferred them to the People's Savings Bank of Sacramento, one of the defendants in the case. At the same time the People's Savings Bank became the assignee of another promissory note, given by Poorman in March, 1878, to the Odd Fellows' Savings and Commercial Bank of Sacramento for about \$40,000, which was secured by a subsequent deed of trust on the same two hundred acres of land and some other real property, and also by a deed absolute on its face of the same property.

Being thus the owner and holder of the two promissory notes given by Poorman and of the several liens and securities for the satisfaction of each of them, the People's Savings Bank caused the two hundred acres of land to be sold under the first deed of trust, and at the sale the land was bid in for the bank for the sum of \$10,125.

After acquiring the right of property to the land, the bank entered into an agreement with Chandler, to sell and convey it to him, and to transfer to him all the interest which it had in his \$6,000 note and mortgage for the sum of \$12,000. In performance of this agreement the bank, on August 9,

1879, caused the trustees, who had sold the land, to make the deed of it to Chandler. This deed the bank had recorded, and notified Chandler of the fact; and Chandler executed and delivered to the bank his promissory note for \$12,000, and a deed of trust on the land as security for the payment of the note; but the bank withheld from his possession the deed, and refused to deliver the \$6,000 note and mortgage, assigning as a reason that Mrs. Poorman—the intervenor in the case—claimed an interest in them. And, in fact, Poorman, the payee of the note, had, in December, 1878, after he had assigned it to the Capital Savings Bank, “sold, assigned and transferred to his wife, Margaret Poorman, all indebtedness of every nature and kind due and owing from L. C. Chandler on book account or otherwise.”

Failing to obtain possession of his deed and note and mortgage, Chandler refused to pay the interest due on his \$12,000 note. The bank ordered the land to be sold under the deed of trust, and the action in hand was brought to enjoin the sale, to obtain possession of his deed and the \$6,000 note and mortgage, and for a decree adjudging that Mrs. Poorman had no right, title, or interest in the note and mortgage.

Upon the trial of the issues raised by the pleadings in the original action, and by the intervention, the Court adjudged that, on August 9, 1879, after the arrangement between Chandler and the bank as to the sale and transfer of the two hundred acres of land and of the interest of the bank in the \$6,000 note and mortgage, there remained an undisposed of balance of \$1,087.66 on the note, to which the intervenor was entitled by her assignment of December, 1878; and that, as assignee, she was entitled to a judgment for that amount and interest thereon, from August 9, 1871, and to a decree of foreclosure, unless the plaintiff paid the same before sale; and that upon making such payment the plaintiff was entitled to delivery of the \$6,000 note and cancellation of the mortgage, and to possession of his deed, and to an injunction upon payment of the interest due on the \$12,000 note within thirty days, otherwise the injunction would be dissolved.

It is contended that the judgment in favor of the intervenor is erroneous, because she acquired no interest in the Chandler note by the assignment to her of December, 1878, as her assignor had, before that time, transferred all his interest in the note by the transaction between him and the Capital Bank, and the subsequent transaction between him and the Odd Fellows' Bank, so that in December, 1878, there

remained in him no residuary interest to transfer, and, therefore, the intervenor was not entitled to judgment against Chandler nor to foreclosure of the mortgage.

But after the assignment to the Capital Bank there remained in Poorman an assignable interest in the note, and that interest passed to the intervenor by the assignment of December, 1878, unless the assignor had previously transferred it. But, in fact, he had made no previous assignment of it. It is only claimed that when, on the 6th day of March, 1878, he conveyed by deed of trust to the Odd Fellows' Bank, by way of security, the same 200 hundred acres which he had formerly conveyed to the Capital Bank by deed of trust for a like purpose, the Odd Fellows' Bank became a lien holder upon the land subordinate to the Capital Bank, and as such was entitled in law to control the assignable interest of Poorman in the note.

This claim is founded upon the right which a subordinate lien holder has, under the law, to demand that the prior lien holder shall resort to the things upon which he has an exclusive lien, etc., for the satisfaction of his lien, if he can do so without risk of loss to himself or of injustice to other persons. (Sec. 2899, C. C.) And it is contended that the acquisition of that right by the Odd Fellows' Bank imposed upon the Capital Bank the duty of exhausting the entire interest in the Chandler note and mortgage upon which it had an exclusive lien, before proceeding to enforce its prior lien against the land covered by the subordinate lien of the Odd Fellows' Bank; and that this duty, with its corresponding right, passed by the assignments of the original indebtedness of Poorman and its securities, to the People's Savings Bank, which had become the sole owner and holder of the exclusive and subordinate liens.

Of course, a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be displaced by some Act of the lien holder which shall postpone him in a Court of law or equity to a subsequent claimant. As an exclusive lien holder on personal securities the People's Savings Bank might have exhausted those securities for the satisfaction of its prior lien before proceeding to enforce it against land on which it had also a prior and subordinate lien before proceeding to enforce it against land on which it had also a prior and subordinate lien, but it did not; it sold the land under the first deed of trust, applied the proceeds as far as they went in satisfaction of its prior lien, and looked to the personal securities, on which it had the exclusive lien, for the surplus.

By the sale under the first deed of trust, and by the absolute deed under the second deed of trust, the entire estate in the 200 acres of land vested in the People's Savings Bank; and, being the absolute owner of the land, and holder of the note and mortgage on which it had the exclusive lien, it sold and transferred them to the plaintiff. By the sale the plaintiff took whatever estate and interest the bank had in them on the 9th of August, 1879. On that day the bank claimed no right to the surplus of the note after satisfaction of its prior lien. It waived whatever right it had to the surplus. A lien or a right may be waived or lost by any act or agreement between parties by which it is surrendered or becomes inapplicable. So when the bank sold and transferred the note and the land it discharged them of the liens which it had upon them, and, as vendor, absolved itself from all the rights and duties appertaining to them—whatever they were—passed to and became vested in its vendee, Chandler; and the surplus of the \$6,000 note, after the satisfaction of its liens, belonged to the payee of the note (Poorman) or his assignee. The finding of the Court that the intervenor was his assignee, and the decree adjudging her to be such, and entitled to the residuary interest in the note were therefore correct; and there is no error in the judgment prejudicial to the plaintiff. As to him the judgment appealed from is therefore affirmed.

We concur: Sharpstein J., Myrick, J., Ross, McKinstry, J.

IN BANK.

[Filed September 21, 1882.]

No. 8081.

CHANDLER, RESPONDENT,

VS.

PEOPLE'S SAVINGS BANK, RESPONDENT,
POORMAN, INTERVENOR.

INTEREST—MONTHLY BALANCES—ACCOUNT. In this case the findings as to interest, *held* not sustained by the evidence.

ID.—ID. The case shows that it was not the habit of the parties to charge interest on monthly balances. When parties themselves settle their accounts without charging each other with interest, it is not in accordance with law or equity to go behind such settlements for the purpose of allowing interest in favor of one party against the other. Such settlements are considered conclusive, unless impeachable for mistake or fraud. Transactions anterior to them and included in them, are not interest-bearing.

Appeal from Superior Court, Sacramento County.

Joseph McKenna, for appellant.

Beatty and Freeman & Bates, for respondents.

McKEE, J., delivered the opinion of the Court:

But, in ascertaining the surplus to which the intervenor, who was the respondent in the foregoing case, No. 7802, and is appellant in this case, was entitled, as assignee of the Chandler note and mortgage, the Court found that before the date of the note Chandler and Poorman had been, for many years, engaged in several business enterprises which resulted in outstanding unsettled accounts between them, and on January 12, 1876, Chandler executed the note and mortgage to cover whatever indebtedness he might owe Poorman individually, or on account of the business enterprises between them, which were then terminated.

That indebtedness, as estimated by the Court, amounted, in fact, to \$2,630, and not to \$6,000—the sum for which the note and mortgage were given. But in making the estimate the Court found and credited Chandler with an item of \$2,700 “for interest from the 16th of December, 1865, when Poorman succeeded to and assumed the business of Hovey & Poorman, on the monthly balances in favor of Chandler on his individual account until October 13, 1868.” This finding is attacked by the intervenor, and it appears to be unsustained by the evidence.

The evidence upon the subject consists of the books of account, which had been kept by the parties in the business in which they were engaged, and the testimony of the accountant who examined them. It proves the entry of monthly credit balances in the account of Chandler from December 16, 1865, until October 1, 1868, as found by the Court; also of balances after October, 1866, on Chandler's accounts, and on other accounts between Chandler and Poorman during the years 1866, 1868, 1869, 1870, 1871, 1872, 1873, 1874, and 1875. “Each of the balances were ascertained by adding up monthly, during the time aforesaid, the debts and credits of the previous month, and entering the difference between them as an item of credit for the next ensuing month, without interest, and that no interest was ever charged or entered on any credit item or balance during the time said accounts ran.”

The balances thus ascertained and entered were not accounts stated on which interest was chargeable. The parties seem to have ascertained them every month for their own convenience in keeping their accounts; and the fact that in ascertaining them each month, no interest was calculated

or included and charged on the balance of the previous month, proves that they were not intended to be interest-bearing balances.

Besides, the uncontroverted evidence shows that the parties had twice settled their "monthly balances"—once in February, 1867, when Chandler gave Poorman his note for \$2,000, bearing interest at the rate of one and one quarter per cent. per month; and next on the 19th of February, 1875, when he gave his note for \$5,000, bearing interest at one per cent. per month. Both those notes were paid before January 12, 1876, when Chandler executed the note and mortgage in controversy.

Those settlements tended to prove that it was not the habit of the parties to charge interest on their balances; and when parties themselves settle their accounts without charging each other with interest, it is not in accordance with law or equity to go behind such settlements for the purpose of allowing interest in favor of one party against the other. Such settlements are considered conclusive, unless impeachable for mistake or fraud. (*Martin vs. Beckwith*, 4 Wis. 219; *Hodges vs. Hosforth*, 17 Ver. 614.) Transactions anterior to them and included in them, are not interest-bearing.

Moreover, the findings of the Court that the interest on the "monthly balances" in favor of Chandler, from December, 1865, until October, 1878, amounting to \$2,170, is not borne out by the testimony. The accountant who made the calculation of interest on the general accounts, upon which the Court based its finding, on being asked, what would be the balance of interest in favor of Chandler up to January 1, 1875? answered: "Well, I cannot tell what it would be on the first of January, 1875. Question—What was it on the first of January, 1876? Answer—On the first of January, 1876, his credit interest was \$2,710, very nearly;" and, he adds, "the first debit balance against Chandler was in February, 1873; and there are no credit balances in his favor between 1875 and 1876. But \$2,700 interest had accrued to him before February, 1876, calculating at seven per cent. part of the time and at ten per cent. part of the time."

It is manifest that this calculation was made on the general accounts between the parties for seven or eight years beyond the time expressed in the finding, and without taking into account any of the interest allowable to Poorman upon monthly balances in his favor; therefore the finding is erroneous, and the judgment as to the intervenor is reversed.

We concur: Sharpstein, J., Myrick, J., Ross, J., Morrison, C. J., McKinstry, J.

IN BANK.

[Filed September 28, 1882.]

No. 10,769.

PEOPLE, RESPONDENT, VS. O'NEIL, APPELLANT.

PEREMPTORY CHALLENGES—ROBBERY—PETIT LARCENY—PREVIOUS CONVICTION—PUNISHMENT FOR LIFE. As the only punishment that can be imposed on a defendant charged with robbery and previous conviction of petit larceny is imprisonment for life (Sections 667 and 671, Penal Code), he is entitled to twenty peremptory challenges. (1070, Penal Code.)

ID —ID. In this case defendant confessed the previous conviction of petit larceny, but pleaded "not guilty" to the charge of robbery.

Appeal from Superior Court, San Francisco.

Gallagher & Welker, for appellant.

Attorney-General Hart, for respondent.

Ross, J., delivered the opinion of the Court:

The defendant was charged with the crime of robbery, and with having been previously convicted of the crime of petit larceny. His plea confessed the previous conviction of petit larceny, but was "not guilty" to the charge of robbery. At the trial he exercised ten peremptory challenges, and afterwards interposed a like challenge to another juror, which the Court below refused to allow. This was an error demanding the reversal of the judgment.

The only punishment that could be imposed on the defendant upon his conviction was imprisonment for life (Penal Code, Sections 667-681); and in such cases the defendant is entitled to *twenty* peremptory challenges. (Penal Code, Section 1070; *People vs. Harris*, 10 P. L. J. 64.)

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J., Myrick, J., Morrison, C. J., Sharpstein, J., McKee, J., Thornton, J.

In the Superior Court, San Francisco,

Department 4.

WILLIAM EDE vs. JAMES PHELAN.

LATERAL SUPPORT—DAMAGE TO BUILDING. Under Section 832 of the Civil Code which declares the rule of the common law that each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of

the adjoining land to make proper and usual excavations on the same for purposes of construction on using ordinary care and skill and giving reasonable notice, and which imposes upon the owner of the adjoining land the duty of "taking reasonable precautions to sustain the land of the other," an omission of the owner of the adjoining land to take such precautions is negligence for which he is liable in damages, not only for injuries resulting immediately to the land, but also for injuries resulting proximately to buildings previously constructed on the land.

J. C. Bates, for plaintiff.

Francis J. Sullivan, for defendant.

WAYMIRE, J.:

The plaintiff sues for damages alleged to have accrued under the following circumstances: The plaintiff owns a lot in San Francisco with a building situate thereon, and the defendant owns an adjoining lot. In January, 1881, the defendant excavated his lot to the depth of fifteen feet below the official grade, and thereby left the plaintiff's building without sufficient lateral support so that, in order to sustain and protect it, the plaintiff was obliged to and did expend \$1,437. The complaint also contains this averment: "The said defendant did not take, or cause to be taken, reasonable or any precautions or use ordinary or any care or skill to sustain the foundation and buildings of said plaintiff adjacent to said defendant's premises as aforesaid, and not having given any previous or reasonable notice to said plaintiff, of his intention and purpose to make such excavations adjacent to said plaintiff's premises and building of plaintiff [the said building] settled, and the wall thereof, composed of stone and concrete, was cut into by defendant and cracked and became weak and insecure, and thereby said plaintiff was compelled to, and did lay out and expend, etc."

The defendant files a general demurrer, contending that the plaintiff has a right to lateral support for his *land* only—not for his *building*; that the defendant had a right to excavate for building purposes on his own lot, on using ordinary care and skill and taking reasonable precautions to sustain the *land* of plaintiff in its natural state unburdened by tenements; and that the loss resulting to plaintiff's building is *damnum absque injuria*.

By the common law, the owner of land had a right to use it in the situation in which it was placed by nature, surrounded and supported by the adjacent land in its natural condition. If the owner of the adjacent land should excavate it without notice to his neighbor, or without taking proper precautions to protect his neighbor from injury by the falling away of the soil, he was liable to his neighbor for the damages resulting. This right of each coterminous owner to lateral and subjacent support for his land, was deemed a natural incident to the ownership of the land—a right of property passing with the soil. It was in that

respect distinguishable from an easement which must have its origin in a grant, either actual or presumed from continual enjoyment. The maxim *sic utero tuo ut alienum non loedas*, operated this restriction upon the principle of the civil and common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface to any extent he may choose to occupy it. Thus it became a settled rule of property, that every land-owner was entitled to have his land preserved in its natural state, and anyone interfering with this right unlawfully was liable for the damages. The use of land by the proprietor was not an absolute right, but was qualified and limited by the rights of others to the lawful enjoyment of their property. (*Humphries vs. Brogden*, 1 Law. and Eq. R. 243; *Thurston vs. Hancock*, 12 Mass. 220; same case with notes, 7 American Decisions 57; *Ferrand vs. Marshal*, 21 Barb. 415; Washburn on Easements, 429; Wood on Nuisances, 166.) But the right of lateral support did not extend to buildings, unless there was an easement arising out of a grant express or implied; and it was held that the doctrine of presumption should be more cautiously and sparingly applied with reference to the easement of lateral support, than to any other form of easement. (*Angus vs. Dallan*, L. R. 3 Q. B. D. 85.)

The same doctrine has been repeatedly affirmed in this country. The reason assigned for the distinction is that by building near the extremity of his own land so that when the adjacent proprietor excavates for the purpose of building, the lateral pressure is increased by artificial means, and through the fault of the coterminous owner, who was first to build, since he might have located his house further from the division line; also, because a man who builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land, and he has no right to load his own soil so as to make it require the support of his neighbor's land without his neighbor's consent. Accordingly, where *Thurston* built a house upon an elevated lot in Boston two feet from the boundary line, and ten years thereafter, *Hancock*, the owner of the adjoining lot, dug so deep into his own lot as to endanger the house of *Thurston*, so that it had to be taken down and rebuilt, it was held that the latter could not recover for injuries to the house, though he was entitled to damages arising from the falling of the soil into the pit so dug. (*Thurston vs. Hancock*, *supra*.) And where a church, which had stood for thirty-eight years within six feet of the line, was caused to settle so that the walls were cracked and injured in consequence of excavations made by the owner of the adjacent lot, an injunction to restrain the excavations was refused. (*Lasala vs. Holbrook*, 4 Paige, 169.)

In 1872, the Legislature of this State codified the law upon this subject as follows: "Each coterminous owner is entitled

to the lateral and subjacent support which his land, by nature, receives from the land of the other." (C. C. Sec. 832.) At the session of 1873-4 the section was amended by adding the following, to take effect July 1, 1874, "subject to the right of the owner of the adjoining land, to make proper and usual excavations on the same for purposes of construction on using ordinary care and skill and *taking reasonable precautions to sustain the land of the other*, and giving previous reasonable notice to the other of his intention to make such excavations." Another section (659) of the same Code defines "land" to be "the solid material of the earth."

Counsel for the defendant contends with much force that, construing these sections together, it appears that the Legislature intended to limit the rule of liability for damages by the excavations of a coterminous owner to *land* exclusive of buildings.

The only case in which the subject has ever been presented for the consideration of our Supreme Court is that of *Ziele vs. Hood* (not reported—see case No. 5341, Records S. C. in Law Library, vol. 280, p. 336). From the agreed statement of facts in that case, it appears that in October, 1874, the plaintiff owned a lot in San Francisco, with a hotel building upon it, and the defendant, who owned the adjacent lot, commenced excavating for the purpose of erecting a house, and thereby endangered the safety of plaintiff's hotel. The plaintiff brought suit to enjoin the excavations until the defendant should take precautions to sustain the hotel. The matter was heard in the late Fourth District Court, by Judge Morrison, now Chief Justice of the Supreme Court. The evidence showed that defendant had given the plaintiff notice before commencing the excavations, and that he had endeavored to sustain the hotel by shoring it up with posts six feet apart, but this being insufficient, the plaintiff underpinned the building with a brick wall at an expense of \$410.50, and the Court gave judgment that the defendant should pay this sum as the measure of damages. The following is a copy of the findings: "That the plaintiff is the owner of a lot of land on which is situated a building described in the agreed statement of facts, and that the defendant is the owner of the lot of land adjoining thereto. That the defendant, for the purpose of building on his lot, made excavations along the side of plaintiff's building on his own lot lower than the foundations of the building on plaintiff's lot. That the excavations made on defendant's lot deprived plaintiff's building of the support of the adjacent soil of defendant's lot and endangered the safety of the plaintiff's building, and necessitated plaintiff's building to be underpinned to the depths of defendant's excavations. That defendant erected certain underpinning under the wall of plaintiff's building, but which were totally insufficient and unsafe. That defendant did not use ordinary skill or care in making his excavations, and did not take reasonable precautions

to sustain the land or buildings of the plaintiff. That defendant refused to underpin said wall and sustain plaintiff's land in a safe and careful manner, and that plaintiff underpinned the same at a cost of \$410.50. That the plaintiff has been damaged in the sum of \$410.50." As already stated, judgment for plaintiff was rendered accordingly. This judgment was presented to the Supreme Court upon the issue as to whether the defendant was under obligations to underpin the wall of plaintiff so as to sustain the hotel building, and the Supreme Court affirmed the judgment of the District Court. No opinion was given. It is to be regretted that upon a subject of so much importance the views of the Court were not expressed more fully. But there is no room for doubt that the Court construed the Code as making the defendant in that case liable for injuries to buildings as well as to land. The briefs of counsel show that to have been the only issue in the case.

Looking at the language of the Code in the light of the common law decisions, I cannot understand how this result was reached, except on the theory that since the law imposes the obligation to sustain the plaintiff's *land*, the defendant's failure to do so was negligence for which he is liable not only for injuries to the land, but also for all other damages proximately resulting therefrom. I have not been cited to any other case where this view has been squarely expressed, though it is intimated in *Panton vs. Holland*, 17 Johnson, 100, that negligence in taking reasonable care to prevent injury to the house of a co-terminous owner, might render one liable for damages to the house. So also in *Foley vs. Wyatt*, 2 Allen, 133, and *Shrieve vs. Stokes*, 8 B. Munroe, 453. Where the owner of minerals under a mill excavated them without leaving sufficient support for the mill, so that in consequence of the subsidence of the superincumbent soil the tenant of the mill was injured in his business to the extent of £90, and in his buildings to the extent of £1,500, he was allowed to recover for the full £1,590. (*Brown vs. Robbins*, 4 H. & N. 186.) In the late case of *Gilmore vs. Driscoll*, 122 Mass. 201, which was decided in 1877, Chief Justice Gray says: "If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right." The case is well considered, and although it was there held that the plaintiff could not recover damage to improvements on the land, the Chief Justice thus sets the result of the authorities: "It has generally been considered that for the excavations causing an injury to the soil in its natural state an action would lie; but without proof of a fault by grant or prescription, or of actual negligence on the part

of the defendant, no action would lie for an injury to building by excavating adjoining land when previously built upon." (Id. p. 207.) Thus it is intimated that for negligence on the part of the one who excavates, he may be liable for injury to buildings.

Our Code expressly imposes upon the coterminous owner who makes the excavations the duty of taking reasonable precautions to sustain the land of the other. Failing to perform this duty is negligence *per se*, because it is an "unlawful omission" to perform a duty. If injury result from such negligence either to land or to buildings lawfully resting thereon, it is detriment resulting "from the unlawful omission of another" within the meaning of the Code, for which damages may be awarded. (C. C. Secs. 3281-3.) In a city where lots of land are small and are purchased for the express purpose of building usually to the extremity of the boundary line, it does not seem to be unreasonable to require the coterminous owner to take reasonable precautions to sustain the land of his neighbor, at the peril of answering in damages proximately resulting from his neglect. At any rate, the Supreme Court has so held in *Ziel vs. Hood*, *supra*, and I am not at liberty to disregard that authority.

The complaint here alleges that the defendant did not take any precautions to sustain the plaintiff's land. For the purposes of the demurrer, this is admitted, and I think it shows a cause of action for damages to the plaintiff's building.

Another point presented by counsel for defendant is, that the complaint is defective in not alleging that the plaintiff is free from negligence on his part. This objection is answered by the case of *Robinson vs. W. P. R. R. Co.*, 48 Cal. 426, where it is held that such an allegation is unnecessary in the complaint, the matter being for the defendant to present as a part of his defense.

Nor is it necessary for the complaint to allege a compliance with the municipal regulations in constructing the wall of his building. That also is a matter of defense.

I think the cause of action stated is for injuries to the buildings and not the land. The fourth point that the complaint is ambiguous in this respect is not well taken.

Demurrer overruled—ten days to answer.

September 22, 1882.

Abstracts of Recent Decisions.

Parties claiming the right to enter under the 3d section of the Act of May 14, 1880, land embraced in a homestead entry, required to establish the priority of their claims and secure the cancellation of the intervening entry prior to the allowance of their application.—*Wolf vs. Struble*, Department Interior.

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No. 7.

REHEARINGS GRANTED.

- 7550—De Gutierrez *vs.* Brinkerhoff, August 15, 1882.
8205—Hewlett *vs.* Miller, August 7, 1882.
7087—People *vs.* Center, August 25, 1882.
8119—Dewey *vs.* Frank, August 26, 1882.
7991—S. P. R. R. Co. *vs.* Crampton, August 25, 1882.
7999—S. P. R. R. Co. *vs.* Garcia, August 25, 1882.
8000—S. P. R. R. Co. *vs.* Bennett, August 25, 1882.
8345—Barrett *vs.* Sims. September 14, 1882.
8134—Carpenter *vs.* Natoma Co. September 20, 1882.
8375—Cross *vs.* Zellerbach, October 19, 1882.

Supreme Court of California.

IN BANK.

[Filed September 27, 1882.]

No. 7241.

DODGE, RESPONDENT, *vs.* MEYER ET AL., APPELLANTS.

LETTERS OF CREDIT.—DRAFT.—BILLS OF LADING.—DELIVERY OF GOODS.—PLEDGE. It is well settled that a bill of lading represents the property for which it has been given, and by its endorsement, or by delivery without endorsement, the property in the goods may be transferred, when such is the intent with which the endorsement or delivery is made.

Id.—Id. By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact delivered.

Id.—Id. A person purchasing a draft drawn by the shipper of the goods with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading; usually in the case of a time draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed between the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading, and thus retain his special property in the goods shipped, not only for the acceptance but for the payment of the draft.

- LD.—LD. The endorsee of the bill of lading, who has purchased the draft accompanied by such bill of lading, has a special property in the goods, and has the bill of lading and the shipment it represents for its security.
- LD.—CARRIER'S RECEIPT. There is no difference between a carrier's receipt and a bill of lading.
- LD.—TROVER. The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, this is in law a conversion, be it for his own or another person's use.
- LD.—JUS TERTIA. A bailee cannot, in an action brought against him by his bailor, set up the title of a third person, except by the authorization of that person.
- LD.—LD. Upon the facts of this case it is held defendant Meyer, pledgee of factors, was not an endorsee in good faith of the bills of lading representing the wheat in controversy, which wheat defendant was adjudged to have received in pledge and converted to his own use.

Appeal from Fourth District Court, San Francisco.

Wallace, Lake and Rosenbaum, for appellants.

Wilson & Wilson, Pillsbury, and Thompson, for respondent.

THORNTON, J., delivered the opinion of the Court:

In the year 1874, and prior thereto, E. E. Morgan's Sons were factors and commission merchants, and doing business as such in the city and county of San Francisco. They were extensively engaged during the period referred to, in chartering ships, and transporting wheat and other produce to European ports, to be there sold for account and risk of the owners of such property. The plaintiff and his assignors were farmers in the interior of the State, engaged in raising wheat. The Court finds a full assignment to the plaintiff by the owners of the several lots of the wheat, and all rights and causes of action against defendant.

In 1874, the plaintiff and his assignors made an arrangement with Morgan's Sons for shipping certain wheat owned by them to England, and its sale there. The terms of such arrangement were as follows:

Morgan's Sons were to charter a certain ship, to wit, the ship *Star of Scotia*, especially for the farmers (the plaintiff and his assignors), and therein to ship for them their wheat to England, the farmers to retain control thereof as to time, place, and terms of sale, and as to whether the wheat was to be sold afloat prior to arrival in England, or on arrival there, or to be stored and held there for a market—the factors (Morgan's Sons) to pay the inland freight to the ship, and

shipping charges, putting the wheat on board ship, and, if desired, make to the farmers severally such further advances in money, on their respective lots of wheat, as in the aggregate, with the inland freight and charges, would amount to twenty dollars per ton of the wheat; Morgan's Sons to attend to making sales of the wheat, at such time and place as directed by the farmers, and in remuneration for such services, they (Morgan's Sons) were to receive a stipulated interest on the advances made, and a commission on the price realized when the wheat should be sold.

These farmers sent forward from the interior their several lots of wheat to Morgan's Sons in September and October, 1874, who received them at divers times between the first of September and the sixteenth of October, 1874. Morgan's Sons had, during the period last named, chartered and had ready for loading in the bay of San Francisco five ships, viz.: *St. Charles*, *Star of Scotia*, *El Dorado*, *Oberon*, and *Twilight*, and on receipt of the lots of wheat above mentioned, instead of loading them all on the ship *Star of Scotia*, they were, without the knowledge of these farmers, put on board the five several ships whose names are given above. They also, without the knowledge or consent of either of the farmers who owned the several lots of wheat, agreed to pay a different and generally higher rate of freight than that agreed on with the owners of the wheat.

In June, 1874, Morgan's Sons had procured special letters of credit from several merchants and bankers in England, and among others from Rathbone Bros & Co. and Brown, Janson & Co., whereby the former were authorized to draw their drafts at sixty days' sight upon the parties issuing the letters of credit, to amounts specified therein, against shipping documents, viz., invoice, bills of lading, and policy of insurance for wheat shipped at California, at the rate of forty-two shillings and sixpence per quarter cost, freight, and insurance; the documents to be surrendered to the drawees of the drafts against their acceptances.

In the same year, and after the obtaining of these letters of credit, Morgan's Sons became indebted to the defendant Meyer, and before any of the wheat above referred to had been forwarded to them for shipment, they made arrangements with Meyer to use the wheat which they expected to receive and to comply with the credits in the following manner: They (Morgan's Sons) to ship the wheat to England, take out bills of lading therefor in their own name, and draw against them as provided in the credits, and to secure acceptance thereof to said Meyer, to pledge the wheat by de-

livering to him the bills of lading, endorsed by them in blank, accompanied with the other shipping documents, and Meyer, on acceptance of the drafts, to deliver to the drawees thereof, for their security and reimbursement, the shipping documents above mentioned. Meyer was to make advances to Morgan's Sons from time to time as required, and credit them with the drafts as fast as they were drawn and delivered to him by Morgan's Sons. Morgan's Sons were, when this arrangement was made, insolvent, and did not expect to have any wheat of their own for shipment. They relied wholly on the arrangement made with Meyer to carry out the agreement made with the farmers, to ship their wheat as above detailed. Meyer knew all the time the facts above stated, but the farmers knew nothing of the letters of credit or their terms.

When the wheat to be shipped had been placed on board the vessels, Morgan's Sons procured from the master of each ship bills of lading in their name. The bills of lading were made out for the whole or the major part of each cargo; and none were taken in the name of either of the farmers; but Morgan's Sons had included in the bills of lading the several lots of wheat owned by the farmers and shipped for their risk and account with wheat of other persons, and so mingled their wheat that it was in no manner distinguishable from the entire mass of the cargo. The bills of lading represented Morgan's Sons as the shippers, and provided that the wheat mentioned in them should be delivered to the order of Morgan's Sons or their assigns, on the arrival of the ships at their several ports of destination in Europe. Morgan's Sons were indebted to Meyer in divers sums of money, to them lent and advanced by Meyer prior to the times the wheat of the farmers was received by them; and while the shipments of the wheat were being made, Meyer advanced to them further sums of money from time to time, to be by them used in their business, in anticipation of the delivery to him by them of the drafts to be drawn on the parties in England, who had issued the credits above mentioned, against the wheat shipped, in pursuance of the arrangement above stated.

The course of business between Morgan's Sons and Meyer is thus stated in the findings of the Court below:

"As loans and advances were made from time to time by defendant to E. E. Morgan's Sons, promissory notes were given by said Morgan's Sons to defendant for the amounts so loaned or advanced. As the wheat was being put into the ships from day to day, said E. E. Morgan's Sons took

from the mates of said vessels 'mates' receipts' for the quantity loaned, and delivered said mates' receipts to defendant as his security for said loans and advances, and the said promissory notes; and when said ships were loaded, and bills of lading receivable, an accounting was had between said E. E. Morgan's Sons and defendant, the mates' receipts were delivered to the masters of the ships and bills of lading taken from the masters by said E. E. Morgan's Sons in their firm name, and to their own order.

"Immediately upon receipt of each of said bills of lading, E. E. Morgan's Sons drew their draft against the wheat therein mentioned, and in conformity with the terms of said letters of credit, procured a policy of insurance upon the cargo represented by such bills of lading, and made an invoice of said wheat and endorsed the draft, bill of lading, policy of insurance, and invoice, all in blank, and delivered the same to defendant.

"The drafts, so accompanied with said shipping documents, were then delivered to and taken by defendant at a sum fixed upon by him and said E. E. Morgan's Sons, and the sum so fixed upon was applied in part to payments of the amounts due by said E. E. Morgan's Sons to defendant on previous indebtedness, and the balance in cash was applied in payment of the promissory note or notes given while the ship was being loaded. The defendant then in some instances sold said drafts, so accompanied by said shipping documents, to bankers in San Francisco, but generally remitted the same to his agent in London, who caused the same to be accepted by the drawees and said shipping documents delivered to them.

"Said E. E. Morgan's Sons kept in their books an open running account with said Daniel Meyer, wherein they regularly credited him with all moneys received from him, and charged him with the several drafts as soon as delivered.

"This account shows that from July, when said arrangement with Meyer was made, until E. E. Morgan's Sons failed—on the 19th of October—said E. E. Morgan's Sons were continuously indebted to said Daniel Meyer."

It appears that settlements of account were had from time to time between Morgan's Sons and Meyer, and the balance carried forward in the account between them. On the first of July, 1874, the balance due by Morgan's Sons to Meyer was \$28,168.37. The settlements referred to above seem to have been generally had twice a month, and the balances due Meyer varied on each settlement, and increased in amount generally until the balance due to defendant on

the 17th of October, 1874, amounted to \$90,118.19. The bills of lading and invoices embraced all the wheat sued for, and by the transactions above stated, the Court finds the defendant received "the said wheat in pledge."

That during all the times above referred to, Morgan's Sons were heavily indebted over and above their assets, and were utterly insolvent, of which defendant was, during the whole time, aware; that the farmers above mentioned knew nothing of their indebtedness or insolvency, but on the contrary, they had been informed by them that they were wealthy, and their agreement to ship through them was made with the understanding that the advances to be made by them under their agreement, were to be made to them by Morgan's Sons from their own resources, all of which they believed to be true.

The advances made by Morgan's Sons to these farmers amounted to \$1,151.18, which sum includes the inland freight and shipping charges paid by the latter. That all the transactions of Morgan's Sons with Meyer were made without the knowledge or consent of the farmers. That Morgan's Sons were attached on the nineteenth of October, 1874, soon after the sailing of the ships mentioned, in an action brought against them by the London and San Francisco Bank to recover a debt of more than \$300,000, which had been contracted before the arrangement above stated was made by them with the farmers to forward their wheat for sale to Europe. Of this suit Meyer was all the time aware. He and Morgan's Sons also knew that this suit was to be instituted several days in advance of its being brought, and still continued their dealings as before in taking and receiving bills of lading and drawing drafts against the wheat until the suit was commenced on the day above mentioned; that during the whole period covered by these transactions, Meyer knew that Morgan's Sons were only factors and that they did not own the wheat shipped and dealt with as above stated, and that it was the property of the farmers above referred to. It further appears that the farmers did not know that their wheat had been dealt with as above detailed, or that it had not been handled as agreed on between them and each of them and Morgan's Sons, nor did they know of the transactions had by Morgan's Sons and defendant until of all the ships aforementioned had sailed from San Francisco, and the bills of lading with the accompanying drafts had been, by defendant Meyer, disposed of in San Francisco, or forwarded to his correspondent in Europe, to be presented to the drawees for acceptance.

The wheat reached the hands of the parties in Europe, on whom the drafts were drawn, in due course, and was sold by them, the proceeds of sale collected and applied first to the reimbursement of themselves for the amounts of the drafts and the expenses attending the sales, and the balance was remitted by them to the Grangers' Bank of San Francisco for account of the owners of the wheat.

The Court found that Meyer converted the wheat shipped to his own use, and rendered judgment against him.

It is argued by counsel for defendant, that he (Meyer) never had possession of the wheat, never had any manipulation of it, or handled it in any way; that there was no pledge of the wheat to Meyer, nor did he ever have any property in it; that he was merely employed by Morgan's Sons as a means of transporting the shipping documents to the drawees of the drafts, and therefore the Court, in holding a conversion by Meyer, ruled contrary to law.

It is clear from the facts found by the Court, as above detailed, Meyer knowing that the wheat was not the wheat of Morgan's Sons, but belonged to the plaintiff and his assignors, aided in and assisted Morgan's Sons in shipping and forwarding the wheat in violation of the agreement under which they had received it. He enabled them by advances when, to his knowledge they were insolvent, to ship the wheat to Europe and to procure advances upon it to reimburse him, not only the advances made in shipping the wheat, but also to repay to him a debt due him by Morgan's Sons, contracted prior to the commencement of any dealings in regard to this wheat by Morgan's Sons with its owners. The transactions between Morgan's Sons and himself were entered on with the understanding that the drafts drawn against it by Meyer were to be used to pay to him the large advances made by him, far exceeding the inland freight and expenses of putting the wheat on shipboard, and they were so used. As the different lots of wheat were put on board, the mate of each vessel received and gave receipts for them, and these receipts were endorsed in blank and delivered to defendant as security for the advances made from time to time while the wheat was being shipped, and after each shipment was complete a bill or bills of lading for each shipment were signed by the master and delivered to Meyer with the other shipping documents, along with drafts drawn against them, the shipping documents to be held as security for the acceptance of the drafts. All this was done under an agreement entered into by defendant with Morgan's Sons before any wheat was forwarded to the latter.

At the close of the transactions which took place between them a large sum was due by them to him, exceeding \$90,000, and the drafts were taken, discounted by him (Meyer) and the proceeds used to pay off such indebtedness. The drafts and bills of lading were endorsed in blank by Morgan's Sons and delivered to him under their agreement that they were to be used to secure him as above stated, and these drafts and bills of lading so endorsed, accompanied also with the other shipping documents, were by him forwarded to his correspondent in Europe to be used in procuring the acceptance of the drafts, and when the drafts were accepted to be delivered up to the acceptors. All these things were done by defendant when he not only knew that the property concerning which he was dealing with Morgan's Sons was not owned by them, but that they (Morgan's Sons) had received it to forward it to Europe for sale on account of the owners, and not for the purpose of drawing against it or making it a means of raising money by them to pay off any debts contracted and due by them. These acts were knowingly done, in violation of the contract on which Morgan's Sons had received the wheat.

It is well settled that a bill of lading represents the property for which it has been given, and by its endorsement or by delivery without endorsement the property in the goods may be transferred, when such is the intent with which the endorsement or delivery is made. It was so determined in *Lickbarrow vs. Mason*, decided by the House of Lords in 1793. (See 1 Smith's Lead. Cas. 1858; see also, *Merchants' Bank vs. Union R. R. and Transportation Co.*, 69 N. Y. 376; *City Bank vs. Rome, etc., R. Co.*, 44 Id. 136; *Holmes vs. German Security Bank*, 87 Pa. St. 525; *Emery's Sons vs. Irving National Bank*, 25 Ohio St. 366; Civil Code, Secs. 2126, 2127, 2128, 2129, 2130, 2131, 2132.)

In the case last cited the law is thus stated: "By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were in fact delivered." (25 Ohio St. 366.)

(The words "bill of sale" in the above sentence should, no doubt, be "bill of lading." The context plainly indicates this.)

In the case cited from 69 N. Y. it is said: "Bills of lading are choses in action, and no rule is better established than that instruments of this character may be transferred for a valuable consideration by delivery only." (69 N. Y. 379.)

In dealings between parties living at a distance from each other, when the contract is made by correspondence, it frequently becomes a matter of proper expediency to reserve the *jus disponendi* over goods shipped, especially when the shipper or a person making a draft drawn against the goods desires to secure himself against the insolvency or default of the consignee. These cases assume many shapes. Many of them are referred to and discussed by Mr. Benjamin in his work on Sales. (See Chapter VI, Book II.)

The endorsee for value of a bill of lading which has been delivered to him may bring an action in his own name for the goods, though he cannot generally bring an action on that instrument in his own name. (*Thompson vs. Dominy*, 14 M. & W. 402; *Dows vs. Cobb*, 13 Barb. 316; *Blanchard vs. Page*, 8 Gray, 298.) And generally in all cases where the shipper, having the right of property, endorses and delivers the bill of lading, the endorsee may maintain an action for the goods represented by such bill of lading in his own name.

It thus appears to be established as a correct rule that a person purchasing a draft drawn by the shipper of the goods with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading; usually in the case of a time draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed between the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading, and thus retain his special property in the goods shipped, not only for the acceptance but for the payment of the draft. (*Bank of Rochester vs. Jones*, 4 N. Y. 497; *Dows vs. Greene*, 24 Id. 638; *First National Bank of Cincinnati vs. Kelly*, 57 Id. 36, and cases there cited; *Lanfear vs. Blossman*, 1 La. Ann. 153; *Dows vs. National Exchange Bank*, 97 U. S. 618; *National Bank vs. Merchants' Bank*, Id. 95; *National Bank of Chicago vs. Bagley*, 115 Mass. 229; *Muson vs. Hunt*, Douglas, 299.) All of these cases hold that the endorsee of the bill of lading who has purchased the draft accompanied by such bill of lading, has a special property in the goods, and has the bill of lading and the shipment it represents for its security.

It is established by the findings that Meyer purchased the

drafts of Morgan's Sons and paid for them; that he received the bills of lading and other shipping documents along with the drafts as security for their acceptance, and in the light of the cases above cited, we can come to no other conclusion than as to the transactions between him (Meyer) and Morgan's Sons, their legal effect was to transfer to Meyer a special property in the goods represented by the bills of lading.

The Court found that the transaction was a pledge of the wheat represented by the bills of lading, and in this we think he ruled correctly. In *Bank of Rochester vs. Jones*, 4 Comstock, 503, the Court held such a transaction a pledge. This language is used by the Court in that case: "The transaction may also be regarded as a pledge. Delivery of possession, which is essential to a pledge, here accompanied the pledge. The carrier held the goods as the mere servant of Foster. (Foster was the shipper as Morgan's Sons are here.) And the delivery of the carrier's receipt to the bank was a good, symbolical delivery of the flour. It was as effective in transferring the possession as the delivery of the keys of a warehouse or the receipt of a storekeeper." Justice Cowen, in *Grosvenor vs. Phillips*, 2 Hill, 147, says that a conventional lien by way of pledge or mortgage may as well be raised in the hands of "a carrier as a right by absolute sale. *Haille vs. Smith*, 1 Bos. and Puller, 563, was no more."

We can perceive no difference between a carrier's receipt as far as relates to the question before us, and a bill of lading. The receipt of the carrier is really a bill of lading for goods to be transported by land. (*Dows vs. Perrin*, 16 N. Y. 125; *Grase vs. Andrews*, 100 Mass. 565; *Blade vs. Chicago, etc., R. R.*, 10 Wis. 505; *Dows vs. Rush*, 28 Barb. 157.)

But it is said that Meyer received these shipping documents from Morgan's Sons merely for the purpose of transmitting them to the drawees of the drafts, and had no other interest in them other than a mere intermediary by whom they were sent to the drawees; that he occupied the same position as a bank in New York to whom a draft payable in Boston had been sent from San Francisco for collection, which transmits it to a correspondent in the last named city for the purpose of accomplishing what the bank in New York had undertaken to do, namely, the collection of the draft. Such a contract might have been made by Morgan's Sons with Meyer, but it does not appear that any such contract was entered into. The findings of the Court

negative any such arrangement, and we think such findings are fully sustained by the evidence. Nor do we perceive any reason for making any such arrangement. Morgan's Sons could have transmitted the drafts as well as Meyer. The usual mode of transmitting drafts by the mails was as open and accessible to them as to Meyer. The evidence shows strong reasons why Meyer should have taken them as security for the acceptance of the drafts. The drawers were insolvent, on the edge of bankruptcy, and Meyer in the exercise of the most ordinary prudence as a merchant or banker might well have desired security until the drafts had been honored by acceptance. He could not trust the drawers, and he had every reason to believe, as the evidence shows, that the drawees were of high and undoubted credit, whom he might trust without security, and could with safety surrender to them the bills of lading. Moreover, such an arrangement was suggested and allowed by the letters of credit. It may be asked why, if he desired security, he did not have an agreement with Morgan's Sons that he might retain the bills of lading as security for the payment of the drafts as well as for acceptance. This has already been partly answered by what has been said of the known high credit of the drawees. A further reason may be given: the drafts would not then have gone forward on the terms of the credits, and the drawees would not have accepted them.

Whether the letters of credit afforded any security to Meyer for the acceptance of the drafts need not be considered. If they did, Meyer did not rely on such security. If Meyer had relied on such security, this could not prevent him from bargaining for the further security of the bills of lading, which the findings show was procured by him by contract with Morgan's Sons.

In the case before us the defendant assumed control of the property of the plaintiff and his assignors, and the right to dispose of it, by means of the bills of lading transferred to him under the arrangement with Morgan's Sons. He did this with a full knowledge of their right of property. He assisted Morgan's Sons in violating the terms of the bailment under which they had received the property of the parties above mentioned. Morgan's Sons had received the property to send it abroad to be sold without right to pledge or incumber it; this was known to the defendant, yet he aided and combined with them to incumber it by the drafts drawn against it under the letters of credit. By the transfer of the shipping documents control of the wheat was vested in

Meyer. It was in his power to have transferred the property to a *bona fide* purchaser, and he did transfer it to the parties who issued the credits under circumstances which gave them a right to detain it for the payment of the drafts drawn against it and accepted by them. (Civil Code, Sec. 2369; *Green vs. Campbell*, 52 Cal. 586; *Newhall vs. C. P. R. R. Co.*, 51 Id. 350.)

In *Liptrot vs. Holmes*, 1 Kelly (Ga.), 391, said Warner, J., delivering the opinion of the Court: "The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, this is in law a conversion, be it for his own or another person's use." The learned Justice cites 6 Bacon's Abr. 677; *Bristol vs. Burt*, 7 Johns. 258; *Reid vs. Colcock*, 1 Nott & McC. 600; *Reynolds vs. Shuler*, 5 Cowen, 323.

In *Cobb vs. Dows*, 9 Barb. 242, the rule is thus stated: "The proof need not show a tortious taking, or that the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiff's title, or under an honest but mistaken belief that the property was their own, they would still be liable to plaintiffs if their acts in regard to it amount to a conversion. If they have taken it into their own hands or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability to plaintiffs is established." In *Boyce vs. Brockaway*, 31 N. Y. 433, the law as thus stated is approved, and is said to be fully sustained by the authorities, of which a number are cited. (See also *West Jersey R. R. Co. vs. Trenton Car Works Co.*, 32 N. J. 517; *Webster vs. Davis*, 44 Me. 152; *Hare vs. Pearson*, 4 Ind. 78.)

It is contended that Meyer never had possession of the wheat, never handled it, and therefore did not convert it. Some of the cases just above cited expressly held that this is not necessary. To this we add *Cannah vs. Hule*, 23 Wend. 462, where it was held that to constitute a tortious taking it was not necessary that there should be an actual manucaption of the goods. A mere claim of dominion, an intention intimated to interfere with goods under a pretense of right or

authority amounts to a constructive trespass, and no demand is necessary before bringing an action of trover. (See *Schroepel vs. Corning*, 5 Denio, 240; *Covell vs. Hill*, 2 Seldon, 374.)

But it is evident here that Morgan's Sons received the wheat under a bailment which they violated—intended to violate it before they received it. They had made arrangements for that purpose with Meyer before the wheat came to hand. Such an arrangement violative of this contract of bailment with the plaintiff and his assignors was made between Morgan's Sons and Meyer, with full knowledge on the part of Meyer that the arrangement was of that character. The inference is justified by the facts found that there was between these parties a combination or conspiracy to carry out this arrangement in exclusion of the rights of the farmers with whom they were dealing. The act of one conspirator in furtherance of the common purpose is the act of all. When Morgan's Sons took the wheat with the agreement with Meyer to ship it in violation of this agreement, and commenced loading it on the ships in pursuance thereof, they were guilty of a conversion of the property intrusted to them, and Meyer's relation to them of confederate, aiding and abetting them in their wrongful conduct, made him a cotrespasser with Morgan's Sons, and he could also be charged with the conversion. It is a significant circumstance which sustains this view that Meyer, under the arrangement, advanced the money to pay the inland freight—the freight on the wheat to San Francisco—by which Morgan's Sons obtained possession of the wheat. Granted that Morgan's Sons were removing the wheat with such purpose under the arrangement made with Meyer, and that Meyer was conspiring with and aiding them to do it, the plaintiff might then have maintained an action for the conversion of the wheat, even while it was on the wharf and before it was delivered on shipboard. The transactions subsequently had in accordance with this arrangement established beyond doubt that the entire dealing with the wheat was with intent to use it for their own benefit in violation of and in hostility to the rights of the farmers who had intrusted their wheat to Morgan's Sons.

It is too clear to admit of argument that as soon as the contract of bailment was violated by Morgan's Sons they became trespassers, and their constituents were entitled to take the wheat out of their hands. It was not necessary to wait until their plan was so far carried out as to get the wheat on shipboard. The first acts in violation of their con-

tract gave this right to their principals, the farmers, and they were then entitled to recover possession of their property.

It may be further said that whatever possession or right to the possession Meyer had was derived from the plaintiff and his assignors through the fraudulent and unauthorized conduct of Morgan's Sons, in which he was a participant. It would be strange, conceding that neither the plaintiff nor his assigns could recover against the master of the ship on which the wheat was laden under the contract of affreightment, after it was so laden, that Meyer could set up the title of the master to defeat a recovery by the plaintiff or those of whom he is the assignee. Having received the wheat under a contract to deal with it for one purpose, and using it, or, rather misusing it for another, ought Morgan's Sons to be permitted to take advantage of their own wrong and set up a delivery of the wheat to a master under a contract of affreightment, which was in part execution of the unauthorized scheme to wrong their constituents? The statement of the proposition is an answer to it. Meyer's rights to the possession are no higher than Morgan's Sons, his assignors. If Morgan's Sons, employed as mere custodians, but clothed with the *indicia* of property, so as to appear to be the ostensible owners, had sold to a *bona fide* purchaser, it might be argued that a recovery could not be had against Morgan's Sons, because the plaintiff was not entitled to the possession against the *bona fide* purchaser; but surely such position would not be tenable.

Further, a bailee cannot, in an action brought against him by his bailor, set up the title of a third person, except by the authorization of that person. The question is discussed and many of the cases cited in *Palmtag vs. Doutrick*, 8 Pac. L. J. 884. (See *The Idaho*, 93 U. S. 579.) In *Biddle vs. Bond*, 6 Best and S. 225, it is held, following *Thorne vs. Tisbury*, 3 H. & N. 534, that a bailee can set up the title of another only "if he defends upon the right and title and by the authority of that person." (6 B. & S. 234.) We find no authorization of the shipmaster here to defend on his title, and therefore it cannot be used by Meyer for his protection.

A question is made on the phraseology of the twenty-fifth finding "that all of said cargoes of wheat were consigned by E. E. Morgan's Sons to said Rathbone Bros. & Co. and Brown, Jansen & Co., and in due course reached their hands," etc., as inconsistent with the conclusion that Meyer could control the wheat as endorsee of the drafts and shipping documents. We are unable to perceive any such in-

consistency. Surely this language cannot mean more than that Morgan's Sons, so far as they were able to control the wheat, consigned it to the parties named, and that the wheat reached these parties in due course, that is, in the course indicated by the previous findings, by accepting the drafts, and on such acceptance, receiving the bills of lading from Meyer by which they (Rathbone Bros. & Co. and Brown, Jansen & Co.,) were enabled to and did secure the possession of the wheat.

We have examined the errors assigned in regard to the rulings of the Court in relation to the testimony, and find no error in them.

Some of the findings were assailed as not sustained by the evidence. We are of opinion, as plainly indicated above, that they were sustained. Some conclusions of law were inserted in the findings of fact, in regard to the dealings found as to mates' receipts and the bills of lading. The Court held that the transactions in regard to them amounted to a pledge. In this, we think the Court ruled correctly.

There is no error appearing in the record, and the judgment and order are affirmed as to July 1, 1882.

We concur: Sharpstein, J., Ross, J. Myrick, J., Morrison, C. J.

I concur: (*Green vs. Meyer*, No. 4879; March 14, 1878.)

MCKINSTRY, J.

DISSENTING OPINION.

I dissent. In 1874, the firm of E. E. Morgan's Sons were commission merchants and factors in San Francisco, engaged in chartering ships, which they controlled for themselves, for the purpose of shipping wheat from California to foreign countries, for sale. With these factors a number of wheat growers in this State entered into agreements for forwarding their wheat to them, to be shipped by them to Europe and sold for the account of the owners. By the terms of the agreements Morgan's Sons were to take charge of the wheat, make advances on it to the farmers to an extent not exceeding twenty dollars per ton, inclusive of all necessary advances for shipment and transportation, ship it to Europe and sell it in European markets, and when sold account to the respective owners for the proceeds of sales, less their allowances, rates, commissions and other expenses.

Under this agreement between Morgan's Sons and the farmers, the former received from the latter, at the port of Vallejo, in this State, during the months of September and October, 1874, a large quantity of wheat, including the

plaintiff's wheat, which they shipped from Vallejo, on board ships chartered by them for that purpose, consigned to Rathbone Brothers & Co. and Brown, Jansen & Co., to be sold in the Liverpool market for and account of the owners of the wheat.

The ships arrived safely at Liverpool; and the cargoes of wheat were delivered, in good order by the masters of the ships, to the consignees by whom the wheat was sold in Liverpool, and they received the proceeds of the sales. But neither they nor Morgan's Sons returned all the proceeds—less the allowances, rates, compensations and other expenses, according to the agreement between them and the farmers. On the contrary, the consignees in Liverpool applied the proceeds of the sales of the wheat to the satisfaction of certain bills of exchange, which had been drawn by Morgan's Sons against the cargoes, and were accepted by the consignees, and the balance, after payment of the expenses attending the sale, they remitted to the Grangers' Bank of San Francisco for account of the owners of the wheat. But as the owners failed to receive the proceeds of the sales of their wheat, they, by their actions, seek to make the defendant liable for the value of the wheat, because of his connection with the transaction between him and Morgan's Sons, whereby he purchased the bills of exchange, drawn against the wheat, which bills were accepted and paid by the drawees.

The bills of exchange were drawn under the following circumstances: After Morgan's Sons had contracted with the farmers to take charge of their wheat for shipment, transportation and sale, they, for the purpose of enabling them to charter vessels and carry out their engagements, made an arrangement with Rathbone Brothers & Co. of Liverpool, and Brown, Jansen & Co. of London, to consign the shipment of wheat to them for sale, if they would make advances upon the shipments. For that purpose Rathbone Brothers and Co., and Brown, Jansen & Co., agreed to make advances to them to the extent £100,000 sterling, according to the terms of two special letters of credit, which were as follows:

“Liverpool, 30th June, 1874.

“*Messrs. E. E. Morgan's Sons, San Francisco, Cal.*

“DEAR SIR: We hereby authorize your draft upon us at sixty days' sight (60 days' sight), payable in London, against shipping documents—namely, invoice bills of lading and policy of insurance for wheat shipped at California or

Oregon—at the rate of forty-two shillings and sixpence (42s 6d) for California wheat, and forty-five shillings (45s) for Oregon wheat, each of fair quality, and each per quarter of 500 pounds, cost, freight and insurance; the insurance to be effected with approved offices, and the documents to be surrendered to us against out acceptances. This credit is limited to the amount of one hundred thousand pounds sterling (£100,000), which will be renewed by advice from us of the arrival and sale of cargoes.

“We hereby agree that all bills drawn by virtue of this credit shall be duly honored when presented at our office at Liverpool, if drawn and negotiated before the 30th June, 1875.

“You will please add to all drafts under this credit, and charge to E. E. M.’s S., as per your L. C., dated June 30th, 1874.

“We remain, dear sirs, yours faithfully,

[Signed]

“RATHBONE, BROS. & Co.”

At the time of the transactions, Morgan’s Sons were known to themselves and the public to be insolvent; but, being armed with these letters of credit, the defendant, on the faith of these letters, agreed to purchase the bills of exchange to be drawn according to the terms of the letters; and for that purpose to make advances of money to the insolvent factors, from time to time, as their needs might require it, in handling the wheat, which they had contracted to ship and to sell for their principals. Accordingly he did, during the months of August, September, and October, 1874, advance various sums of money, for which they gave, at the time of the advances, their promissory notes and deposited with him the mates’ receipts of the wheat as it was received from day to day on board the vessels. When each ship was laden, these slips were returned to the master of the ship, and he then issued a bill of lading for the ship’s cargo to the order of Morgan’s Sons. An invoice was also made of the wheat, and policies of insurance were procured upon the cargo represented by the bill of lading; and with these in hand, Morgan’s Sons had an accounting with the defendant of the advances which had been made in the shipment of the wheat; and for the sums which had been advanced, bills of exchange were drawn on the European correspondents, according to the letters of credit, payable, on sixty days’ sight, to the order of Morgan’s Sons; these bills of exchange were then attached to the invoices, policies of insurance, and

bills of lading, and all of them, being respectively endorsed in blank, were delivered to the defendant, who then returned the promissory notes to their makers. Some of the bills of exchange the defendant sold to bankers in San Francisco; but all of them were transmitted, in connection with the invoices, policies of insurance, and bills of lading, by him to his agent in London, to be presented to the drawees for acceptance.

It is solely from this transaction between the defendant and Morgan's Sons, that the Court below found that the defendant became a pledgee of the wheat, and that, on refusal to the owners, on demand, he was guilty of a conversion; and it is sought to be established as a principle of commercial law, that the purchaser of a bill of exchange, drawn against a shipment of wheat by the consignor, upon a letter of credit given to him by the drawee, becomes a pledgee of the wheat, by the receipt of a bill of lading which has been received, in connection with the bill of exchange, to be transmitted, with the exchange, to the drawee against his acceptance, according to the terms of his letters of credit, and that, as holder of the bill of lading for that purpose, he is guilty of a conversion of the wheat, in refusing to deliver it on demand, although, in fact, he never received the wheat, never claimed or exercised the right to receive it, and never exercised any dominion or control over it. To such a principle I cannot consent. In my judgment the transaction, as proved, does not sustain the findings of the Court below, and the decision is erroneous, and should be reversed.

"A bill of lading," as has been said by the Supreme Court of the United States, "is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the *right to receive the property at the place of delivery*. Notwithstanding it is designed to pass from hand to hand with or without endorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or promissory note is. Its transfer does not preclude, as in these cases, all inquiry into the transaction in which it originated," or the purpose for which it may be endorsed or delivered. So where it was made to appear that an endorsed bill of lading was received by one who was the mere agent of the shipper, it was held that the property represented by the bill did not pass to the holder. (*Lincker vs. Ayeshford*, 1 Cal. 75).

Neither the endorsement nor the delivery of the bill has any effect in passing the property represented by it, except as the result of a contract between the parties for the sale or transfer of the property itself; and such a contract, whatever it be, may be shown by parol, or by circumstances to explain, limit or extend the operation of the endorsement and delivery. (*Gardner vs. Howland*, 2 Pick. 599.) I therefore agree to the principle enunciated in the prevailing opinion, that a bill of lading represents the property for which it was given, and that the right to the property passes by endorsement and delivery of the bill, *when such was the intent with which the endorsement was made*; but that is the pivotal question in this case. The defendant received the bills of lading, but for what purpose? Was it for the purpose of receiving the wheat at the port of delivery, or for transmission as agent of the drawer or drawees, to the drawees of the bills of exchange, who had stipulated by their letters of credit for the surrender of the bills of lading against their acceptance of the bills of exchange?

On that question, the transaction, as found by the Court, leaves no room for legal doubt. It is conceded that so far as the shipment of the wheat was concerned, everything done up to the putting it on board and the reception of the bills of lading for it, was authorized. It is also conceded that the bills of lading were properly issued, according to law, to the orders of Morgan's Sons. Now, the endorsements of the bills were not made in pursuance of any contract between them and the defendant to pledge the wheat. They had no authority, in fact or in law, to pledge it; none in fact, for they were not authorized to pledge by their principals; none in law, for the law did not allow it—did, in fact, prohibit it, (Sec. 2368, C. C.); nor does the transaction evidence an attempt to pledge; for being clothed with actual and legal authority to ship and sell (Sec. 2388, *supra*), the consignors delivered the wheat into the possession of the master of the ship, who, as their bailee, received it and delivered it to the consignees, by whom, it was in fact, received and sold, under the authority of the owners on their account, so that from the time of the shipment of the wheat until its sale by the consignees, the wheat was in possession of the owners. It never at any time came into the possession of the defendant as pledgee or otherwise. No pledge is valued until the property is delivered to the pledgee (Sec. 2988, C. C.), or is deposited in pursuance of an agreement between the parties, with a third person to hold for the pledgee. (Sec. 2903, *supra*.) The captains of the ships were not pledge-holders for the defend-

ant. During the voyages they were the agents of the owners of the cargoes, and the safe arrival of their ships at port, and the delivery of their cargoes to the consignees, exonerated them and the owners of their ships from all liability to any one on account of the cargoes. As, therefore, the wheat was never delivered to the defendant, was never deposited with a third person to hold for him—as he never claimed or exercised the right to receive it, and never interfered with the dominion and control of it, nor with the *jus disponendi* of the plaintiffs, exercised through their authorized agents, I cannot judicially see in the transaction between the defendant and Morgan's Sons any of the elements of a pledge. Nor does the transaction make the defendant a *tort feasor*. As I have already said, the defendant did not obtain possession of the wheat, did not assume to exercise any ownership or control over it, and did not use the bills of lading to take or claim the property, or to interfere with it in any way, in the possession of the plaintiff or of his consignees. Where one does no act of disturbance of the possession of the property of another, or of interference with it, or of assumption of dominion and control over it under pretense of a right he is not guilty of a trespass or conversion of the property, although he may be holder of a bill of sale which represents it; the law does not educe a taking and conversion of property out of non-action; there must be a wrongful act or omission and a consequent invasion of another's right to constitute a *tort*.

The defendant did receive the bills of lading attached to the bills of exchange which he had purchased, did transmit them to his agent at London, and through his agent, surrender them to the drawees of the bills of exchange against their acceptance. These were not wrongful acts nor an invasion of the plaintiff's rights of property in the wheat in the hands of his authorized agents. The reception, transmission and surrender of the bills were made by him, as agent of the drawees of the bills of exchange, according to the terms of the letters of credit. The letters prescribed the mode in which the credit was to be given, the terms on which it was to be given, and the limits of the credit; the mode was the measure of the credit; and the drawees of the bills would not have been bound for their acceptances except by strict compliance with the terms of the letters. (Sec. 2866, C. C.) The liability of the correspondents could not have been enforced by the defendant, except in the mode which he pursued.

Defendant followed the mode prescribed, surrendered the

bills of lading, and his bills of exchange were accepted; he had, therefore, no occasion to take or interfere with the wheat, which was all the time in the possession of the plaintiff; and it is manifest, from the findings of facts by the Court, he did not take nor intermeddle with it, or claim, or assume to exercise dominion or control over it.

The case of *Green vs. Meyer*, which forms the basis of Justice McKinstry's concurrence with the prevailing opinion, is one of those imperviable decisions which is not satisfactorily authoritative—the reasons for it being still in the breasts of the Judges by whom it was rendered.

McKEE, J.

IN BANK.

[Filed September 27, 1882.]

No. 7242.

UPTON, RESPONDENT, vs. MEYER, APPELLANT.

CASE FOLLOWED. On authority of *Dodge vs. Meyer*, (7241), judgment and order affirmed.

Appeal from Fourth District Court, San Francisco.

Wallace, Lake, and Rosenbaum, for appellant.

Pillsbury and Thompson, for respondent.

By the COURT (McKee, J., dissenting):

This cause is in all material points similar to *Dodge vs. Meyer*, No. 7241, and on the authority of that case, the judgment and order are affirmed as of July 1, 1882.

IN BANK.

[Filed September 27, 1882.]

No. 7229.

McMAHON, RESPONDENT, vs. MEYER ET AL., APPELLANTS.

CASE FOLLOWED. On authority of *Dodge vs. Meyer* (7241), judgment and order affirmed.

Appeal from Fourth District Court, San Francisco.

Wallace, Lake, and Rosenbaum, for appellants.

Wilson & Wilson and McKune, for respondent.

By the COURT (McKee, J., dissenting):

This case is in all material points similar to *Dodge vs. Meyer*, No. 7241, and on the authority of that case the judgment and order are affirmed.

IN BANK.

[Filed September 15, 1882.]

No. 10,739.

THE PEOPLE, RESPONDENT,

VS.

LOCK WING AND AH HOO TONG, APPELLANTS.

CRIMINAL LAW—VENUE—EVIDENCE—APPEAL. Assault to commit murder. There was sufficient evidence in support of the venue. *People vs. Manning*, 48 Cal. 338.

1D.—WITNESS—CHARACTER OF HOUSE. The Court did not err in denying defendants' motion to strike out the evidence of a witness respecting the character of the house (a gambling house) in which the difficulty occurred. The matter to which the witness testified was a *fact*, and not an opinion; and it was competent evidence in the case.

1D.—FLIGHT. The wounded men pointed at one of the defendants, and told the witness to arrest such defendant, when he, the defendant, was only twenty feet distant, and thereupon such defendant ran away. *Held*, this was sufficient to justify the admission of the evidence concerning such defendant's flight.

Appeal from Superior Court, Alameda County.

A. A. Moore, for appellants.

Attorney-General Hart, for respondents.

By the COURT:

The defendants were convicted in the Superior Court of Alameda County of an assault with intent to commit murder, and on this appeal they rely upon three grounds for the reversal of the judgment.

1. It is claimed that there was no proof that the crime was committed in the county of Alameda. There was sufficient evidence in support of the venue, and it satisfactorily appears that the act was committed in Alameda County. (*People vs. Manning*, 48 Cal. 338.)

2. In the next place, it is urged that the Court erred in denying defendants' motion to strike out the evidence of the witness Ross, respecting the character of the house in which the difficulty occurred. The matter to which Ross testified was a *fact*, and not an *opinion*, and it was competent evidence in the case.

3. The third point is that it was error to permit the witness Shoon, to testify to an occurrence which was immediately followed by the flight of the defendant, Lock Ah Wing. The evidence is, that the wounded men pointed at the defendant, and told the witness to arrest him. Defendant was about twenty feet off, and may not have heard what the wounded men said to the witness; but it clearly appears that they pointed at the defendant when he was only twenty feet distant, and thereupon the defendant immediately ran away. This was sufficient to justify the admission of the evidence concerning the defendant's flight.

These are the only points relied upon in defendants' brief, and in our opinion neither of them is well taken.

Judgment and order affirmed.

IN BANK.

[Filed October 3, 1882.]

No. 8417.

IN THE MATTER OF THE ESTATE OF A. C. RAND, DECEASED.

OLOGRAPHIC WILL — PRINTING — WRITING — BLANKS — PROBATE. An olographic will must be entirely *written* by the handwriting of deceased. (C. C. 1277.) Hence a paper, portions of which are printed on a stationer's blank, and portions in the handwriting of the deceased, is not an olographic will.

Id.—Id. The paper must be considered in its entirety, and the portions written cannot be admitted to probate, omitting the printed portions.

Appeal from Superior Court, Alameda County.

Pillsbury & Titus and Crockett, for appellants.

Gray & Haven, for respondent.

By the COURT:

A paper, of which the following is a copy, was admitted to probate as an olographic will, viz.:

"In the name of God. Amen.

I, Augustus C. Rand, of the city and county of San Francisco, State of California, of the age of seventy-six years, and being of sound and disposing mind, and not under any restraint or the influence or representation of any person whatever, do make, publish and declare this my last will and testament in manner following, that is to say:

First: I direct that my body be decently buried without undue ceremony or ostentation, but with proper regard to my station and condition in life and the circumstances of my estate.

Secondly: I direct that my executor, hereinafter named, as soon as he has sufficient funds in his hands, pay my funeral expenses and the expenses of my last sickness.

Thirdly: I will and bequeath to Mary Ann Babcock, wife of George Babcock of Oakland, county of Alameda, State of California, all the right, title, and interest belonging to me in the piece of real estate situated in Brooklyn township, county of Alameda, State of California, being known as the McCracken ranch, consisting of about sixty-five (65) acres, together with all improvements and additions that I have made thereunto.

Also all my right, title, and interest in a house and lot in the city and county of San Francisco and State of California, known as No. 9 Second avenue, with all the improvements and appurtenances thereunto belonging.

Lastly: I hereby appoint George Babcock of Oakland, county of Alameda and State of California, the executor of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal this twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

AUGUSTUS C. RAND.

The foregoing instrument, consisting of——page besides this, was, at the date thereof, by the said——signed and sealed and published as and declared to be——last will and testament in presence of us, who, at——request, and in——presence and in presence of each other, have subscribed our names as witnesses thereto.

Residing at——

Residing at——

The portions of the paper in italics were printed in the form of a stationer's blank, and the portions in roman letters were in the handwriting of the deceased, filling the vacant spaces therein. In due time an heir of the deceased moved for revocation of the probate, on the ground that the paper was not an olographic will, it not being entirely in the handwriting of the deceased, and the Court granted the motion. The section of the Civil Code referring to this subject, Section 1277, is as follows:

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed."

The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The Legislature has seen fit to prescribe forms requisite to an olographic will, and those forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should, thereby, in effect, change the statute and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased.

Order affirmed.

DEPARTMENT No. 2.

[Filed September 29, 1882.]

No. 8356.

NICHOLS, APPELLANT, vs. DUNPHY, RESPONDENT.

PRACTICE—NEW TRIAL—APPEAL—ORDER. When an application for a new trial has been made in due form upon a settled statement and the Court has passed on the motion, it cannot afterwards vacate the order and pass upon the motion again.

Id.—Id. Time for appealing commences to run from the date of originally passing upon the motion.

Id.—Id. It is doubtless true that where it appears that the motion for a new trial was inadvertently or prematurely made, the Court might set aside its order, and in some cases it would be its duty to do so. But such grounds did not exist in this case.

Id.—Id. Appeal from judgment must be taken within one year.

Appeal from Superior Court, Santa Clara County.

J. C. Black, for appellant.

D. L. Delmas, for respondent.

By the COURT:

On the sixth of July, 1878, a judgment was entered against Carmen Dunphy, from which, and from an order denying her motion for a new trial, she appealed to this Court on the twenty-seventh of March, 1882.

The respondent now moves in this Court to have the appeals from both the judgment and order denying the motion for a new trial dismissed, on the ground that neither of said appeals was taken within the time prescribed by law for taking such appeals. It is conceded that the appeal from the judgment was not. But it is insisted on behalf of appellant,

that the appeal from the order denying her motion for a new trial was taken in time. For the purpose of determining whether it was or not, it will be necessary to ascertain at what time said order was made.

It appears by the record that the appellant filed and served a notice of her intention to move for a new trial on the sixteenth of July, 1878, and that the bill of exceptions upon which said motion was based was settled and filed on the twenty-third of August, 1878.

The motion was submitted and denied on the twelfth of March, 1880.

On the seventeenth of April, 1880, the Court made and entered an order in the following words, to wit:

"Upon motion it is ordered that the order heretofore made denying the motion for a new trial herein, be and the same hereby is set aside, and the said motion now remains undisposed of, upon the ground that the judgment in this cause upon the defendant William Dunphy's appeal, reverses the whole judgment as to both defendants, and counsel for plaintiff except to the ruling of the Court, and cause is ordered on trial calendar for proceedings."

Afterwards, on the twenty-seventh of January, 1882, the Court made and entered another order denying said motion for a new trial, and it is from this last order that this appeal is taken, and if the Court had the power to set aside its first order denying said motion for a new trial, and to proceed *de novo* upon said motion, said appeal was taken in time. Otherwise not.

The question, as we view it, is not a new one in this Court.

In *Coombs vs. Hibberd*, 43 Cal. 452, it was held that when an application for a new trial had been made in due form upon a settled statement, and the Court had passed on the motion, the Court could not afterwards vacate the order and pass upon the motion again. And the same thing had been previously held in *Waggenheim vs. Hook*, 35 Cal. 216. The reasoning upon which those decisions were based commends itself to our judgment.

It is doubtless true that where it appears that the motion for a new trial was inadvertently or prematurely heard, the Court might set aside its order, and in some cases it would be its duty to do so. But we are unable to discover any such ground for upholding the action of the Court in this case. It certainly does not appear that the attorney who consented to the submission of the motion in the first instance, had no authority to do so, and in the absence of any thing appear-

ing to the contrary, we will presume that he had such authority. But it does not appear that the motion to set aside was based upon that ground and the Court expressly bases its action upon another and, in our judgment, wholly insufficient ground.

Upon the authority of the cases above cited, we must treat this appeal as if it had been taken from the order of March 13, 1880, and in that light, the appeal unquestionably was taken too late.

Motion to dismiss granted.

DEPARTMENT No. 1.

[Filed August 25, 1882.]

No. 8012.

HOSKINS, APPELLANT, vs. SWAIN ET AL., RESPONDENTS.

AGENT--FOREMAN--FOUNDRY--ASSIGNMENT--PAYMENT--ACCOUNT. Action to recover the price of jackscrews. Plea, payment. *Held*, plaintiff's foreman had ostensible authority to assign an account as security for money borrowed for the use of foundry by the foreman.

Id.—*Id.* In authorizing the foreman to act as general superintendent and manager of the foundry, the plaintiff had intrusted him with the conduct of the business therein, and empowered him to do everything necessary or proper and usual in the ordinary course of the business, for effecting the purpose of his agency. (2319, O. C.) The sale and delivery of metals cast at the foundry and the receipt of the purchase money for them, by the foreman, were acts which would fall within the ostensible authority conferred upon him. Payment to him of a debt due to the foundry would be binding upon the plaintiff; and if the foreman, by assignment, authorized another to collect the debt for him, and the debtors paid it, believing, in good faith, that the person was authorized to receive payment, the payment is binding upon the plaintiff, though, in fact, the authority did not extend to the doing of what was done.

Appeal from Superior Court, Yuba County.

Fuller & Howson, for appellant.

J. S. and E. A. Belcher, for respondents.

McKEE, J., delivered the opinion of the Court:

This was an action of account to recover the price of fifty jackscrews sold and delivered to defendants. The plea was payment. On the trial it was proved that, at the time of the transactions involved in the case, the plaintiff, who was owner of the foundry from which the screws were obtained, was absent from the State. Before leaving he had given his other full power of attorney to act for him in his absence, and left his foreman of the foundry to continue to act, as he

had been doing, as the general superintendent and manager of the foundry. In that capacity the foreman had been accustomed, in the management of the business, to buy material for the foundry, employ workmen, sell the goods, collect accounts, and receipt for moneys received and disburse them in the payment of bills, etc., against the foundry, and this course of dealing had been sanctioned by the plaintiff.

During the absence of the plaintiff the foreman contracted to cast the jackscrews for the defendants. Before the screws had been cast and delivered, the foreman had borrowed a sum of money for the use of the foundry from one Cockrill, to whom, after the screws had been delivered to the defendants, he assigned the accounts for the screws as security for the money; and the defendants, when the account was presented to them for payment by the assignees, paid it in full, taking his receipt. This was payment, if the foreman had authority to assign the account as security, or otherwise, for money borrowed for the use of the foundry.

And we think that, ostensibly, as regards the public, the foreman had such authority. For, in authorizing him to act as general superintendent and manager of the foundry, the plaintiff had intrusted him with the conduct of the business therein, and empowered him to do everything necessary or proper and usual in the ordinary course of the business, for effecting the purpose of his agency. (Sec. 2319, C. C.) The sale and delivery of metals cast at the foundry, and the receipt of the purchase money for them, by the foreman, were acts which would fall within the ostensible authority conferred upon the foreman. Payment to him of a debt due to the foundry would, therefore, be binding upon the plaintiff; and if the foreman by assignment, authorized another to collect the debt for him, and the debtors paid it, believing, in good faith, that the person was authorized to receive payment, the payment is binding upon the plaintiff, though, in fact, the authority did not extend to the doing of what was done.

Judgment and order affirmed.

We concur: Myrick, J., McKinstry, J.

Abstracts of Recent Decisions.

PLEDGE—LARCENY BY PLEDGOR. An owner of personal property which is pledged is guilty of larceny in taking the property from the pledgee with the intention of converting it to his own use. *Brady vs. Rose*, Sup. Ct. Iowa, 26 Alb. L. J. 252.

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Supreme Court of California.

IN BANK.

[Filed October 2, 1882.]

No. 6950.

IN THE MATTER OF THE OPENING AND EXTENSION OF GROVE STREET, IN THE CITY OF OAKLAND.

OAKLAND STREET WORK—PETITION—JURISDICTION—APPEAL—OBJECTIONS.

The proceedings examined purport to have been taken under the Act to provide for the opening of streets in the city of Oakland. (Stats. 1878, p. 614.)

Recapitulation by the Court:

1. The petition of the freeholders did not give power or jurisdiction to the Council.
2. The "final resolution of determination" did not conclusively adjudge that the petition was sufficient to give the Council powers to proceed upon it.
3. The petition of the City Council to the County Court affirmatively shows the proceedings taken before the Council are invalid, and gave to the County Court no jurisdiction.
4. The objection to the jurisdiction of the County Court was properly taken, and could have been taken at any stage of the proceedings in that Court, or, for the first time, in this Court on appeal.

McAllister & Bergin, for appellants.

Morgan, Poston, and Glascock & Glascock, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The proceedings to be examined purport to have been taken under the Act of March 28, 1878, "to provide for the opening of streets in the city of Oakland." (Statutes 1878, p. 614.) The second and third sections of the Act provide that such proceedings shall be commenced by petition of five or more residents and freeholders within said city, addressed to the City Council; the petition to contain, amongst other statements, "a statement that, in the opinion of the petitioners, the public interests require that the improvement asked for (describing it generally) should be made."

The fourth, fifth, sixth, seventh, and eighth sections of the Act of March 28, 1878, are as follows:

"Sec. 4. At the regular meeting next after the meeting at which the petition is presented to the Council, or at any subsequent meeting to which the proceedings may be regularly adjourned, the said Council may, by resolution duly passed, determine the lands to be benefited by the improvement asked for in the petition, and to be assessed for the expenses thereof. Said resolution shall contain a description of each lot, piece, or parcel of land necessary to be taken and condemned for such improvement, and shall also specify the exterior boundaries of the district of lands benefited thereby, and to be assessed therefor, and shall direct the City Engineer to make a survey and map of the lands described in the resolution, a copy of which resolution shall be forthwith transmitted by the Clerk of said Council to the said City Engineer.

"Sec. 5. It shall be the duty of the City Engineer, immediately upon receiving a copy of the resolution mentioned in section four, to survey the lands described in said resolution and make a map thereof, and to return said map to said Council within twenty (20) days from the receipt by him of said copy of the resolution; said map shall show each piece, tract, or parcel of land necessary to be taken and condemned for said improvement, and also the exterior boundaries of the district to be benefited by such improvement and to be assessed on account of the cost and expenses thereof, as declared in the resolution, and the area thereof, exclusive of public streets and alleys. Said City Engineer shall have the right to enter upon the lands and make examinations and surveys thereof, and such entry shall constitute no cause of action in favor of the owners of lands, except for injuries resulting from negligence, wantonness, or malice.

"Sec. 6. The Council, at its regular meeting next after the return of the map by the City Engineer, shall pass a preliminary resolution, declaring the intention of the corporation to make the improvement asked for in the petition. Said resolution shall contain a description of each piece, lot, or tract of land necessary and sought to be taken for the improvement, and also the exterior boundaries of the district of lands to be benefited thereby, and assessed for the expenses thereof; the resolution shall also specify a time, not more than fifteen (15) days from the passage thereof, for the hearing by said Council of objections to the proposed improvement, and said resolution shall be published in at least

one daily paper printed and circulated in said city of Oakland, daily (Sundays and non-judicial days excepted,) for at least ten (10) days prior to the time fixed for said hearing.

"Sec. 7. If a majority of the owners of the lands in area to be assessed for the expenses of said improvement shall, on or before the day fixed by said resolution for the hearing of objections, appear and protest against said improvement, the proceedings shall be discontinued; *provided, however*, that such protest must be in writing, and shall contain a description of the land claimed by each protestant; *and, provided further*, that the Council may, by an unanimous vote of all its members, approved by the Mayor, proceed to cause such improvement to be made, notwithstanding such protest.

"Sec. 8. If the owners of a majority in area of the property to be assessed for the expenses of said improvement fail to appear and protest as provided in section seven, or if the Council by an unanimous vote, approved by the Mayor, order said improvement to be made, said Council must immediately pass a final resolution declaring such determination. Such resolution shall refer to the preliminary resolution, mentioned in section six, by its number, for a description of the lands necessary and sought to be taken and condemned for said improvement, and the district to be assessed for the expenses thereof."

The ninth section of the Act provides that, immediately after the passage of the final resolution above spoken of, the Council shall apply to the County Court by petition for the appointment of three Commissioners to assess compensation, etc., and that the petition by the Council "shall recite all the proceedings had in the premises, specify the exterior boundaries of the lands sought to be taken and the exterior boundaries of the lands to be benefited," etc. It further requires a copy of the map made by the Engineer (previously provided for) to be annexed to the petition.

The tenth section provides that the County Court "shall take jurisdiction of the proceedings," and that the Judge thereof shall, by order, fix a day for the hearing of the petition, and that notice of the time for hearing shall be published for ten days. It is required (eleventh section) that the notice specify the exterior boundaries of the lands to be taken and to be benefited; state that damages for property taken will be determined, and that such damages, together with costs, etc., will be assessed upon the lands benefited by Commissioners appointed on the return day.

"Sec. 12. At the time fixed for the hearing, or at such other time as the hearing may be adjourned to, the Court

shall proceed to hear any party interested *touching the regularity of the proceedings, and if satisfied that the proceedings have been regular, shall appoint three competent and disinterested Commissioners.*" * * * The thirteenth and fourteenth sections treat of the qualifications and duties of the Commissioners, including the prescribed form and matter of their report to the Court. The fifteenth provides, that upon the filing of the report of the Commissioners, the Court shall, by order, fix a day for hearing objections to the confirmation thereof, and shall direct notice of the time and place of said hearing to be given, etc.

"Sec. 16. Upon the day fixed for the hearing, the Court shall proceed to hear any party interested *upon any question touching the regularity of the proceedings, the sufficiency of the compensation awarded, or the justice or equality of the assessment, and may confirm said report, or set the same aside, or remand the same for correction or alteration in any particular,*" etc.

The other sections of the Act relate to the compensation of the Commissioners, the entry of a judgment and its enforcement.

We agree with counsel for the respondent that the Act under consideration "naturally divides itself into three parts:

"First—Proceedings of Commissioners and City Council up to 'final resolution of determination.'

"Second—Proceedings of Council and County Court, up to and including appointment of Commissioners.

"Third—Subsequent proceedings of Commissioners and County Court."

It is urged by counsel for the respondent that ample opportunity, upon due notice, is afforded, by the statute, for all who object to the proceedings to be heard. It is said: "Three several days in Court are accorded interested parties: 1st. Before the City Council (under Sections 6 and 7.) 2d. Before the County Court on appointment of Commissioners (Section 12.) 3d. Before the County Court on confirmation of the report of the Commissioners (Section 16.)" And counsel argue that it was quite evident it was not intended the same objections could be raised at each of the three hearings, but was intended that the final resolution of the City Council should be determinative by the validity and regularity of the proceedings prior to such resolution, and that the appointment of Commissioners by the County Court should, in like manner, be a final adjudication of the validity and regularity of the proceedings which preceded the appointment.

If it were intended that the action of the City Council should be conclusive, the requisite that its petition to the County Court must "recite all the proceedings had in the premises" would subserve no useful purpose. A presentation of the resolution of the Council, together with the map, or a description of the lands to be taken, and of the lands benefited, would be all that would be necessary to inform the County Court of facts necessary upon which to base its action.

But, by section ten, the County Court "takes jurisdiction" "only upon the filing of the petition mentioned in section nine." The power of the City Council is itself limited, and if the petition to the County Court shows affirmatively that the Council had exceeded its power in passing the "final resolution" (so-called,) the County Court cannot take jurisdiction. The requirements that the petition of the Council shall "recite all the proceedings had in the premises" is not complied with by the recital of any proceedings, however irregular or even *void*. So to construe it would be to fritter away the evident intent of the statute, that the County Court should be informed that valid proceedings, culminating in a valid "resolution of determination," had been taken by the Council.

The record before us contains the petition of the City Council to the County Court, and the subsequent proceedings in that Court, including the confirmation of the report of the Commissioners and the final judgment as provided for in Section 18 of the Act. The petition of the City Council is in the nature of a pleading, and if such petition is radically defective, it is clear the County Court acquires no jurisdiction to enter the judgment.

If the petition is radically defective, the point may be taken on appeal, although its defects were not pointed out by demurrer or objection below. The petition is radically defective if it appears on its face that the City Council did not acquire power to act by reason of the insufficiency of the petition presented to the Council—a *fortiori*, as the statute gave parties in interest no opportunity before the City Council efficiently to object to its insufficiency.

The third section of the Act requires the petition of the five or more residents and freeholders to City Council to contain "a statement that, in the opinion of the petitioners, *the public interests require* that the improvement asked for (describing it generally) should be made."

The averment in the petition of the City Council to the County Court is, that the petition of the residents and free-

holders to the Council contained a statement, that, "in the opinion of the petitioners, the improvement asked for *should be made.*"

It may be said, it is enough if the freeholders express a desire that the street be opened or other improvement made; this must be all required by the statute, since it must be presumed that the Legislature has not attempted to give the power—power which it could not give—to five or more residents and freeholders of deciding whether the "public interests require" a municipal improvement; in other words, its necessity or expediency.

But the statute does not purport to confer such power upon the petitioners. The fourth section of the Act provides that, at the regular meeting next after the meeting at which the petition of the freeholders is presented, "the Council *may*, by resolution, determine the lands to be benefited," etc. Thus, the ultimate power of determining the necessity and expediency of the work is placed in the City Council. The power, however, like every other power of the Council, is derived from the charter or statute, and can be employed only in the manner, and with the limitations prescribed in the statute. The statute authorizes the City Council to proceed with the acts looking to the opening of a street only after a certain petition shall be filed with the Clerk. It was for the Legislature to prescribe, and the Legislature has prescribed, what the petition shall contain. Until a petition is presented containing substantially all that the law says shall be inserted in a petition to initiate the proceedings, the Council has no power or jurisdiction to act with reference to the opening of a street.

A statement in a petition, that, in the opinion of petitioners, an improvement "should be made," is not in substance the same as a statement that, in the opinion of petitioners, "*the public interests require* the improvement should be made."

And here it may be urged, inasmuch as an "improvement" *ought* not to be made except when "the public interests" require it, that the statement of petitioners of their opinion, "the improvement should be made," necessarily includes an expression of their opinion that the public interests require it. But while the petitioners *ought* not, perhaps, to indulge an opinion that the improvement should be made, because their private interests may be subserved by it, such, nevertheless, may be their opinion. At all events, the authority of the City Council to proceed depends upon a statement in the petition, which statement, or its substantial equivalent,

is not averred to have been in the petition. Proceedings, *in invitum*, by which the property of the citizen is to be taken or assessed are to be strictly construed. This rule is fundamental and imperative. (Cooley on Taxation, 464, and cases cited.)

Thus, on the face of the petition of the City Council to the County Court, it appears that the Council never was authorized by sufficient petition to proceed with reference to the opening of Grove street, or to pass the final "resolution of determination." As a consequence, the petition of the City Council is radically defective and does not support the judgment of the County Court.

Returning to the points of counsel for respondent, it is by them claimed, that the appointment of Commissioners by the County Court is a final and conclusive adjudication of the validity and regularity of the proceedings prior to such appointment—determinative, amongst the rest, of the sufficiency of the petition of the City Council. Passing the question, whether a Court, employing a statutory jurisdiction, special and limited, which can be exercised only upon the presentation of a certain petition, can ever conclusively give itself jurisdiction when no petition (or a totally insufficient one) has been filed or presented, it is enough to say that the statute we are considering does not pretend to confer the power upon the County Court of finally determining the sufficiency of the petition of the City Council. Nor is there anything in the nature of the case which demands that we should recognize the appointment of Commissioners as a final adjudication both of the validity and regularity of the previous proceedings. As we have already seen, the record before us consists of the petition of the Council to the Court and of further proceedings in the Court culminating in a statutory judgment. The petition is the complaint, which, if radically defective, may be objected to at any time. By failing to demur to it, or to object to its sufficiency, appellants did not make that sufficient which was radically defective.

It further and distinctly appears it was the intention of the Legislature that the appointment of Commissioners should not be finally determinative of the validity and regularity of the prior proceeding, from the circumstance that an *appeal* is given to this Court. "Any party feeling aggrieved by any of the proceedings, orders or judgments under this Act, may appeal to the Supreme Court, *as in other cases*." (Sec. 25.)

In "other cases" (with the single exception of suits for a

partition of real estate, where an appeal from a certain decretal order is given in express terms), the appeal can be taken only from the ultimate judgment, which finally disposes of the rights of all the parties, leaving nothing further to be done for the disposition of such rights in the Court of original jurisdiction. By the twenty-fifth section of the Act we are considering, no appeal is granted from the order of judgment appointing Commissioners, but the party feeling aggrieved by such order or judgment may have the same reviewed on an appeal from the final judgment.

If we are correct in holding that the petition of the City Council is radically defective and gave the County Court no jurisdiction to proceed to the appointment of Commissioners, the interpretation of the sixteenth section of the Act becomes comparatively unimportant. The words of that section, which give to every party interested a right to be heard "upon any question touching the regularity of the proceedings," are of themselves broad enough to give to each party interested a right to object to proceedings taken prior to the appointment of Commissioners. It is insisted by respondent, however, that when these words are read in connection with those which declare the order or judgment of the County Court, to follow in case the objections are sustained ("the Court may set the report aside or remand the same for correction or alteration in any particular"), and with the last sentence of the same section ("*if the report be set aside, the matter may, in like manner, be referred to the same or new Commissioners appointed by the Court, who shall proceed as hereinbefore provided*"), it is apparent the only objections which may be taken under the sixteenth section are objections to the conduct and report of the Commissioners. But, even if it be conceded that by its terms the sixteenth section authorizes objections to the conduct and report of the Commissioners alone, an objection to the sufficiency of the petition of the City Council, upon whose averments depends the jurisdiction of the County Court, could be taken on the day fixed for confirming the report of the Commissioners, or at any other day during the pendency of the proceedings.

We have said the petition of the City Council affirmatively shows that the petition presented by freeholders did not give the Council power to take any step toward the opening of Grove street. The objection, therefore, appeared on the face of the petition of the Council, and was in the nature of demurrer. But, if the petition of the Council had recited a freeholders' petition sufficient in form and substance, and

other proceedings regularly conducted, "any party interested" might have objected, by way of answer, that the averments of the petition of the Council were not true. There can be no doubt that the finding of the County Court, upon issues of fact thus raised, would be subject to review (through bill of exceptions on appeal from the final judgment of the County Court. (Sec. 25.) If the averments of the petition of the Council showed all proceedings before that body to have been valid and regular, it *may be* that a party interested would lose all right to dispute such averments by failing to appear at the time fixed for appointment of Commissioners. Here, however, the petition shows on its face that the City Council had no power to do any act looking to the opening of the street.

It is strenuously urged by respondent that the power of the City Council has been conclusively determined by the Council itself; that we are estopped by the "final resolution expressing the determination" to make the improvement from inquiring into the sufficiency of the freeholders' petition, because all parties in interest had an opportunity to object before such resolution was passed by the Council.

From what has already been said with reference to the recitals in the petition of the Council to the County Court, and the contemplated action of that Court upon such petition, it would seem reasonably clear that it is not the intent of the statute that the City Council should itself conclusively determine its own power.

It may be added, the individuals in interest are given by the statute no opportunity to object before the Council.

It will be observed that while the sixth section requires the preliminary resolution of intention to make the improvement, the seventh section does not authorize any less than the owners of a majority in area of the lands to be assessed for expenses to "protest," and does not authorize the owners of property *taken* to protest at all. Further, notwithstanding a protest, the Council may by unanimous vote, with the approval of the Mayor, proceed to cause the improvement to be made.

And by the eighth section, if the owners of a majority in area of the property to be assessed fail to appear and protest the Council must immediately pass a final resolution declaring its determination that the improvement be made.

Each person whose property is to be taken, and each person whose property is to be assessed to pay for the property taken, is affected by, and interested in, the sufficiency of the petition, and without a sufficient petition the Council

has no authority to pass a resolution expressing its determination to proceed with the improvement. When the Council by reason of a proper petition, has acquired jurisdiction over all persons and property in interest, it may go on with the improvement unless a protest is made by the owners of "a majority in area" of the property to be assessed, and may, by a unanimous vote and the approval of the Mayor, go on with the improvement notwithstanding the protest.

Thus—as against the owners of a "minority" in area of the property to be assessed—and as against the owners of the property taken or condemned—the proceedings of the City Council as prescribed by the statute are *ex parte*. If a petition has been filed which gave to the City Council power to proceed, the fact that the proceedings of the Council were *ex parte* would not, perhaps, render the law unconstitutional. But how can it be said the parties in interest had an opportunity to object to proceedings taken *ex parte*?

An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts, upon the existence of which its jurisdiction or power depends. Where, however, the power depends, not upon the existence or non-existence of matters *in pais*, to be established by evidence, but upon allegations in a petition—a portion of the record—the question is not the same. But even if it be admitted that the judgment of the City Council would have determined the sufficiency of the petition, and the power of Council to proceed upon it, as against those given an opportunity to appear and object, the scheme of the statute affords no opportunity to the individual owners of property, to be taken or assessed, to object to the sufficiency of the petition before the Council. As we have seen, the statute requires no notice to each party in interest, upon which he can be heard in opposition to the "final resolution" of the City Council. How can a law be said to give one person (or more than one, the owners of less than a "majority in area") a hearing, when, by its terms, his being heard at all depends upon the action of the others who, with himself, represent the ownership "of a majority in area" of the property to be assessed; when, if he happen to be an owner of the property which the proceedings will deprive him of entirely, he cannot be heard at all; and when the same law declares that the Council, by unanimous vote, may assess him notwithstanding any objection he may make.

To recapitulate:

1. The petition of the freeholders did not give power or jurisdiction to the Council.

2. The "final resolution of determination" did not conclusively adjudge that the petition was sufficient to give the Council power to proceed upon it.

3. The petition of the City Council to the County Court affirmatively shows that the proceedings taken before the Council are invalid, and gave the County Court no jurisdiction.

4. The objection to the jurisdiction of the County Court was properly taken, and could have been taken at any stage of the proceedings in that Court, or, for the first time, in this Court on appeal.

Judgment reversed.

We concur: Sharpstein, J., Myrick, J., Ross, J., Morrison, C. J., Thornton, J.

IN BANK.

[Filed September 28, 1882.]

No. 8520.

BROWN ET ALS., PETITIONERS,

VS.

MOORE, JUDGE, ETC., RESPONDENT.

EXECUTION—JUDGMENT DEBTOR—ORDER—JURISDICTION. If it be admitted that Sections 717 and 720, C. O. P. (relating to persons having property of a judgment debtor, etc.), have any application to an officer holding property of a judgment debtor by virtue of a legal process issued against him, neither of them confers on the Court the power to order such property sold, nor to direct that the proceeds of it be paid to the Clerk of the Court. Accordingly, *held*, the Superior Court exceeded its powers in making an order requiring petitioners, constables, to pay to the Clerk of the Superior Court the proceeds of property sold under executions held by them against a judgment debtor.

Id.—CONTEMPT—PROHIBITION. For the disobedience of that void order, petitioners could not be lawfully punished for contempt; and proceedings looking to that end should be arrested.

Severance, Travers & Hornblower, and Armstrong and Phelps, for petitioners.

Ross, J., delivered the opinion of the Court:

Application for a writ prohibiting the respondent from proceeding further in the matter of certain contempt proceedings against the petitioners.

From the verified petition it appears that during the month of April, 1882, sundry suits at law were commenced by divers persons against one Bartlett in the Justices' Courts of Amador County, to recover certain moneys alleged to be

due from Bartlett to the respective plaintiffs in those suits. Judgment passed for the plaintiffs therein, on which executions were issued and placed in the hands of the petitioners in the present proceedings, who are constables in and for the respective towns of Amador County, in which are established the Justices' Courts that rendered the judgments. The executions thus issued and delivered to the petitioners were by them, as such constables, levied on certain personal property of Bartlett. On the 22d of May, 1882, a judgment was entered in the Superior Court of Amador County against Bartlett and in favor of one Post, for a money demand; and on this judgment execution was issued on the same day and delivered to the Sheriff of Amador County. The Sheriff, on the 24th of May following, levied his writ by delivering to each of the constables (petitioners here) a copy of the same, together with a notice that all the property of the defendant (Bartlett) in their possession and under their control was attached in pursuance of such execution, and demanded of them the possession of the property. The constables refused to deliver the property to the Sheriff, and the next day the latter returned the writ to the Superior Court, stating in his return, substantially, the facts as above given. On the 27th of May, on an affidavit made on behalf of Post, setting forth that the judgments rendered by the Justices' Court were void, the Judge of the Superior Court made an order directing the constables to appear before him on the 29th of the same month and show cause why they should not surrender the property to the Sheriff. On the day named they appeared and filed their several affidavits, declaring that they were not debtors of Bartlett, nor had they any property of his other than that levied on and held by them under and by virtue of the executions first above mentioned. Thereupon the Judge refused to direct the constables to deliver the property to the Sheriff, but on the same day entered an order in the following words: "It is ordered, adjudged and decreed that plaintiff herein (Post) is authorized to institute an action against each of said persons, to wit: C. L. French, constable, H. B. Templeton, constable, W. H. Brown, constable, and W. Payton, his deputy constable, to determine whether or not the said persons hold and retain said property adversely to the defendant—said suits to be commenced within thirty days from the date of this order. And it is further ordered that each of said constables is given leave to sell the said property in their possession belonging to said defendant under the alleged executions in their hands, and they, and each of said consta-

bles is ordered to pay all the proceeds of said sales of property to the Clerk of the Court within ten days after the sale thereof."

A motion was subsequently made on behalf of the constables that that portion of the order of May 29th, purporting to authorize them to sell the property in their possession under the writs of execution in their hands, and requiring them to pay the proceeds of such sales to the Clerk of the Superior Court, be set aside on the ground that the Court had exceeded its jurisdiction in so ordering.

This motion was denied.

The constables sold the property under and by virtue of the executions held by them, and applied the proceeds to their satisfaction, instead of paying them to the Clerk of the Superior Court, as directed by the order of May 29th; and upon these facts being brought to the notice of the Superior Court, that Court made an order to the effect that the constables be brought before the Court at a time stated, and show cause why they should not be adjudged guilty of contempt of Court in failing and refusing to pay the proceeds of the sales of the property to the Clerk, and further directing a warrant of attachment to be issued and delivered to the Sheriff, commanding him forthwith to arrest the constables and hold them in his custody, unless they should execute an undertaking in the sum of one hundred dollars each for their appearance on the day named.

The Superior Court, in making the orders complained of by the petitioners, was proceeding under the supposed authority of Sections 717 and 720 of the Code of Civil Procedure. Even if it be admitted that those sections have any application to an officer holding property of a judgment debtor by virtue of a legal process issued against him, neither of them confers on the Court the power to order such property sold, nor to direct that the proceeds of it be paid to the Clerk of the Court. (*Hartman vs. Olvera*, 51 Cal. 501.) The Superior Court, therefore, exceeded its power in making the order requiring the petitioners to pay to the Clerk of the Superior Court the proceeds of the property sold under the executions held by them against Bartlett. For the disobedience of that void order, the petitioner could not be lawfully punished for contempt. The proceedings looking to that end should, therefore, be arrested. (*Williams vs. Dwinelle*, 51 Cal. 422; *Quimbo Appo vs. The People*, 20 N. Y. 531.)

Demurrer overruled.

We concur: McKinsty, J., Sharpstein, J., Myrick, J., Morrison, C. J., McKee, J., Thornton, J.

IN BANK.

[Filed September, 14, 1882.]

No. 10,727.

PEOPLE, RESPONDENT, vs. FUQUA, APPELLANT.

CRIMINAL LAW — VERDICT — FORMER ACQUITTAL — PLEA — FINDING — JURY.

Where, in addition to a plea of "not guilty," defendant pleads a "former acquittal," the jury must find upon both pleas.

Id.—APPEAL—PRESUMPTION. There is no presumption on appeal, in favor of the correctness of the judgment appealed from, that a plea of former acquittal was withdrawn or waived by defendant, because of the failure of the jury to find upon it.

Id.—Id. The failure to find upon all the issues does not raise a presumption that those not found upon had been abandoned on the trial.

Appeal from Superior Court, Napa County.

Henning and Ham, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

In *People vs. Kinsey*, 51 Cal. 278, the Court said: "If there be a plea of 'not guilty,' and also a plea of former conviction or acquittal, the defendant is entitled to a verdict on each plea, and until there is such a verdict there can be no judgment of conviction;" and that case was followed in *People vs. Helbing*, 8 P. C. L. J. 947.

In this case the defendant, in addition to the plea of not guilty, pleaded a former acquittal. The jury returned a verdict of manslaughter and omitted to find upon the plea of former acquittal. The record does not disclose that the defendant withdrew or waived the defense of a former acquittal; but the Attorney-General contends that in the absence of anything appearing to the contrary the appellate Court must presume in support of the correctness of the judgment of the Court below that that defense was withdrawn or waived.

But we are not aware that the doctrine of presumptions has ever been carried to that length. To presume that a party had withdrawn or waived a defense which he had pleaded, simply because a jury had failed to find upon it, might lead to very serious consequences. The evidence in the case is not before us, and we cannot know whether any attempt was made to establish that defense. But as we view the matter, it is immaterial whether there was or was not. If the jury had found in favor of the people upon the plea of a former acquittal, and had failed to find upon the plea of not guilty, it does not seem probable that we would have

been asked to presume in support of a judgment of conviction, that the defendant had withdrawn or waived his plea of not guilty.

It has been repeatedly held by this Court that the failure of a trial Court to find upon all the issues raised by the pleadings was a sufficient ground for a reversal of a judgment. It has never been suggested in such cases that the failure to find upon all the issues would raise a presumption that those not found upon had been abandoned on the trial.

Judgment and order reversed and cause remanded for a new trial.

IN BANK.

[Filed September 15, 1882.]

No. 10,750.

PEOPLE, RESPONDENT, vs. HARDISSON, APPELLANT.

COMMITMENT—DEPOSITIONS—INFORMATION. An order of commitment under Section 872, Penal Code, is properly endorsed on the depositions taken at the examinations; not upon the depositions accompanying the information.

ID.—JEOPARDY—JUDGMENT—APPEAL—NEW TRIAL. As to the plea of "once in jeopardy" based on a former conviction and reversal by the Supreme Court, *held*: First—It does not appear that the testimony given on the second trial was identical with that given on the first trial; indeed, other evidence was given, material and substantial. Second—This case is not within Section 1262, Penal Code. On the former appeal, not only was the judgment reversed, but the order refusing a new trial was also reversed—which was equivalent to the granting of a new trial.

INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE. The instructions held not conflicting, and the instruction excepted to sustained by *People vs. Cronin*, 34 Cal. 191, and *People vs. Padillia*, 42 Id. 535.

Appeal from Superior Court, San Benito County.

McCroskey & Brotherton, for appellant.

Attorney-General Hart, for respondent.

MYRICK, J., delivered the opinion of the Court:

First—On the seventh of December, 1880, an information was laid before a Justice of the Peace, accusing "John Doe, real name unknown," of the crime of grand larceny, and a warrant of arrest was issued. On the twenty-seventh of that month, the defendant, having been arrested, was examined, and the depositions of witnesses were reduced to writing. The defendant declared his name to be Pierre Hardisson. After the hearing, the Justice endorsed upon the deposition taken on the twenty-seventh (not on the information laid on

the seventh,) the order provided for by Section 872 of the Penal Code. The defendant claims on this appeal that the order should have been endorsed on the depositions accompanying the information, instead of the depositions taken at the examination. The point is not well taken. The order was rightly endorsed on the depositions taken on the examination, and complies with Section 872, Penal Code.

Second—On a former trial the defendant was found guilty, and he appealed to this Court. This Court rendered judgment in the following words: "The defendant was prosecuted for grand larceny, and was convicted of that crime. The evidence was clearly insufficient to justify a conviction, and error is confessed by the Attorney-General. Judgment and order reversed." After the going down of the remittitur the defendant was put upon his trial and interposed a plea of once in jeopardy, such plea being based on the former conviction and reversal. On that plea verdict was for the people. The second trial was upon the same information, for the same offense. 1. It does not appear that the testimony given on the second trial was identified with that given on the first trial; indeed other evidence was given, material and substantial. 2. This case is not within Section 1262, Penal Code. On the former appeal, not only was the judgment reversed, but the order refusing a new trial was also reversed—which was equivalent to the granting of a new trial. There is no merit in the point here made by the defendant.

The following instruction was given by the Court and excepted to: "In order to convict upon circumstantial evidence, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the defendant's innocence, but perfectly reconcilable with the supposition of defendant's guilt." The jury were also instructed that they must be satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt before they find him guilty. There is no substantial conflict in these instructions. The instruction excepted to is sustained by *People vs. Cronin*, 34 Cal. 191; and *People vs. Padilla*, 42 Cal. 535.

We see no error in the record
Judgment and order affirmed.

We concur: Ross, J., McKee, J., McKinstry, J., Morrison, C. J., Thornton, J.

IN BANK.

[Filed October 5, 1882.]

No. 8554.

DAY, PETITIONER, vs. SUPERIOR COURT, RESPONDENT.

INSOLVENCY — BANKRUPTCY — COURTS — JURISDICTION — ATTACHMENT. The estate which passes into the control of the United States Bankruptcy Court by assignment in bankruptcy is that which the bankrupt then has. Property subsequently acquired forms no part of the estate in bankruptcy, nor is it subject to distribution among creditors under the adjudication in bankruptcy.

Id.—Id. When petitioner, a creditor, instituted his attachment suit, having obtained leave from the Bankruptcy Court, and levied upon the interest of P., bankrupt, in property acquired after the adjudication in bankruptcy, he submitted himself, as a creditor, and his rights, to the exclusive jurisdiction of the State Court; and his rights, whatever they might be, were determinable by the laws of the State. The proceedings in bankruptcy in the United States Court did not, in any way, interfere with the proceedings in insolvency in the State Court.

H. C. Firebaugh, for petitioner.

Lake and Lowenthal, for respondent.

MCKEE, J., delivered the opinion of the Court:

In this case the petitioner asks for a writ of prohibition to forbid the defendant—the Superior Court of the city and county of San Francisco—from interfering with the interest of one Simon Peckerman in some personal property, which has been attached in a suit pending in favor of the petitioner against the said Peckerman and one Jeremiah James.

If the Superior Court is entertaining a proceeding of which it has no jurisdiction, or if, having jurisdiction, it is assuming to exercise an unauthorized power over property not subject to its jurisdiction, or which is within the jurisdiction of another tribunal, the petitioner is entitled to the writ which he asks; otherwise he is not. The question, therefore, presented to us relates simply to jurisdiction. (*Appo vs. The People*, 20 N. Y. 531; *People vs. Nichols*, 79 Id. 582; *Muurer vs. Mitchell*, 53 Cal. 289; *Brundage vs. Kern Co.*, 47 Id. 81.)

The facts out of which the question arises are these: In the year 1872, Simon Peckerman and Jeremiah James were co-partners, engaged in carrying on business by the firm name of Peckerman & James. As such they became indebted to various persons, including the petitioner, and, being unable to pay their debts in the due course of business, they, on the twenty-ninth of July, 1872, voluntarily filed their petition, in the United States District Court for

the District of California, to be declared bankrupts, individually and as partners; and, on that day, they were so adjudicated. But they never received their certificates of discharge; and, pending the proceedings, the petitioner, as one of their creditors, procured, on the sixth of June, 1882, from the Bankruptcy Court, an order granting him permission to enforce his claims to final judgment against the debtors. Under that order the petitioner, on June 13, 1882, commenced a suit against Peckerman & James to recover judgment against them for the amount of his demands; and in that suit he caused to be issued an attachment, which was placed in the hands of the Sheriff of Merced County, in this State; and the Sheriff, by virtue of the writ, on June 13, 1882, seized a stock of clothing, dry goods, and general merchandise, which then belonged to the said Peckerman and one Abraham Rosenthal, both of whom were, at that time, co-partners and carrying on business by the firm-name of Rosenthal & Co. On the fifteenth of June, 1882—two days after the levy of the attachment upon their stock in trade, Rosenthal & Co., being insolvent, filed their petition in the Superior Court of the city and county of San Francisco, accompanied with the schedule and inventory required by the State statute of insolvency, to be discharged from their debts as insolvent debtors. Upon filing the petition, the Court, by an order regularly entered, as provided by the statute, directed the Sheriff of the city and county of San Francisco to take possession of all the property of the insolvents; required all the creditors of the firm to appear on July 20th, 1882, to prove their debts and choose an assignee, and stayed all suits and proceedings, including the attachment suit of the petitioner, commenced against the insolvent debtors.

This order, it is contended, the Superior Court had no jurisdiction to make so as to affect the property of Peckerman, or the suit of the petitioner against him, because the proceedings in bankruptcy against Peckerman & James, in the United States District Court, were still pending, under the United States bankrupt law, which, although repealed, had been, by the express terms of the repealing law, continued in force, as to proceedings commenced under it; and, being in force, it suspended the State insolvent law, so that the District Court had exclusive jurisdiction over the persons and property of the adjudicated bankrupts, Peckerman & James.

There is no doubt that the United States Court acquired jurisdiction over the property and persons of those debtors;

and that it still retained that jurisdiction as far as the adjudication of bankruptcy was concerned. All the property of the debtors passed by the assignment, under the adjudication, into the hands of the assignee in bankruptcy; and, in contemplation of law, the property was in the custody of the Court from the commencement of the proceedings. (*Mays vs. The Manufacturers' National Bank*, 64 Penn. 74.) But the estate consisted only of the property which the bankrupts then had. After they had been adjudicated bankrupts and had surrendered all their estate for the benefit of their creditors, they, or either of them, were left free to enter into new business relations, and to make acquisitions of any other property; and property thus subsequently acquired would form no part of the estate in bankruptcy, nor be subject to distribution among creditors under the adjudication of bankruptcy. Such is the law as it has been expounded by the bankruptcy Courts.

In re Isaac Rosenfeld, 1 N. B. R. 319, the debtor, after he had filed his petition and been adjudicated a bankrupt, entered into business relations with some friends, who supplied him with means, and others who opened for him a limited credit, in the business of buying and selling stocks and gold on account, in which he acquired an interest, and it was held that the interest thus acquired did not constitute any portion of the property of the bankrupt, nor had his old creditors any interest in it.

In re C. G. Patterson, Id. 135, the debtor had filed his petition on June 25, 1867, to be adjudicated a bankrupt; and was so adjudicated September 12, 1867. Intermediate the filing of his petition and entry of the order of adjudication, the bankrupt had borrowed \$5,000, which some of his old creditors, who had proved up their debts, sought to have made part of his estate in bankruptcy, for distribution among his creditors, but the Court, Blatchford, Justice, held that neither the money nor its products constituted any part of the estate, and that the bankrupt could not be compelled to account for either.

"When," says the learned Judge, "an adjudication of bankruptcy is made following the petition, it is then judicially established that the proceedings in the case commenced when the petition was filed. The date of the filing of the petition becomes, after the adjudication of bankruptcy, the date from which the assignee takes all the property of the bankrupt, which was his property at that date, but the assignee does not take anything which became the property of the bankrupt after that date." Debts provable

against the estate of the bankrupt must also be due or exist at that date, "subject to the special provisions of Section 19, as to contingent debts in order to be discharged. In other words, the date of the filing by or against a debtor is the date at which, if an adjudication of bankruptcy follows, the old order of things passes away and a new leaf is turned over. Any other construction would work injustice either to the bankrupt or his creditors. As he can be discharged only from debts which existed on the day the petition was filed, it would be wrong to give to the creditors holding those debts property acquired by him after that day, and thus take it away from the bankrupt or from creditors whose debts, because not in existence on that day, cannot be proved against him under his bankruptcy." (Id.)

The property acquired by Peckerman, subsequent to the adjudication in bankruptcy, and attached by the petitioner in his suit against the bankrupts, was, therefore, no part of their estate in bankruptcy, and the United States District Court had no jurisdiction over it.

The mere fact that the petitioner was proceeding under an order of that Court did not give that Court jurisdiction, nor extend its jurisdiction over the proceedings which were commenced under the order. The right granted by the order was one enforceable against the debtor, within the jurisdiction of a State Court, according to the laws of the State. When, therefore, the petitioner instituted his attachment suit, and levied the attachment upon the interest of Peckerman in the property acquired after the adjudication in bankruptcy, he submitted himself, as a creditor, and his rights, to the exclusive jurisdiction of the State Court; and his rights, whatever they might be, were determinable by the laws of the State. According to those laws the rights which he acquired by the levy of the attachment upon the property of his debtor, were inchoate, and subject to be defeated by the death of the debtor, or by an adjudication of the insolvency of the debtor under the State insolvent law. Upon the happening of either event, the attachment upon his property was dissolvable, and the attached property would pass into the hands of the administrator in the one case, or into those of his assignee in insolvency in the other, for the benefit of his creditors. (*Myers vs. Mott*, 29 Cal. 367; *Hensley vs. Morgun*, 47 Id. 622; *Howe vs. Union Ins. Co.*, 42 Id. 528; *Ham vs. Cunningham*, 50 Id. 365; Sec. 17, Insolvent Act of 1880.)

When, therefore, Peckerman & Rosenthal, two days after the levy of the attachment upon Peckerman's interest in the

property, filed their petition in the Superior Court, to be declared insolvent debtors, the Court acquired jurisdiction of the subject-matter and the parties (*Langenour vs. French*, 34 Cal. 92); the property of the insolvents, relieved of the attachment upon it, passed into the custody of the Court for the benefit of their creditors, and thereafter the petitioner, as a creditor of one of the insolvents, and his rights, became subject to the exclusive jurisdiction of the State Court. As a creditor he was bound to seek the enforcement of his demands within that jurisdiction. The United States District Court had no jurisdiction, nor did the proceedings in bankruptcy in any way interfere with the proceedings in insolvency in the State Court.

Writ denied.

We concur: Ross, J., McKinstry, J., Sharpstein, J., Myrick, J., Morrison, C. J., Thornton, J.

DEPARTMENT No. 1.

[Filed October 9, 1882.]

No. 8039.

CUNNINGHAM, RESPONDENT,

VS.

WARNEKEY, APPELLANT.

SERVICE BY MAIL.—NOTICE OF APPEAL.—AFFIDAVIT. The affidavit of service of notice of appeal does not show where the affiant or where defendant (appellant) resided.

ID.—ID.—RESIDENCE. The person making the service and the person served must reside or have their offices in "different places" to justify service by mail.

ID.—ID. As between persons, both of whom were in Santa Rosa, the service should have been personal. (C. C. P. 1012, 1013.)

Appeal from Superior Court, Sonoma County.

Burnett & Newman, for appellant.

A. B. Ware, for respondent.

By the COURT:

The affidavit of service of notice of appeal is as follows:

Venue:

"Daniel Brennan being duly sworn, deposes and says: I am and was at the time of service by mailage of the within copy, notice of appeal, a white male citizen, over the age of eighteen years, and competent to be a witness in this action; that, on the fifteenth day of August, 1881, I served the

within copy notice of appeal by mailage on A. B. Ware, Esq.; attorney for plaintiff, by leaving in the United States Post-office in the city of Santa Rosa, county of Sonoma, and State of California, a copy of the within notice of appeal, directed to said A. B. Ware, Esq., at his place of business in said city of Santa Rosa, and county and State aforesaid, and paying the full postage price thereon and the same registered.

"DANIEL BRENNAN.

"Subscribed," etc.

The affidavit does not show where the affiant or where defendant (appellant) resided. The person making the service and the person served must reside, or have their offices in "different places" to justify the service by mail. As between persons, both of whom were in Santa Rosa, the service should have been personal. (C. C. P. 1012, 1013.)

Appeal dismissed.

DEPARTMENT No. 2.

[Filed October 3, 1882.]

No. 7006.

WELTON ET AL., APPELLANTS,

VS.

COOK ET AL., RESPONDENTS.

LIS PENDENS—NOTICE—QUIET TITLE. Action to quiet title. In a former action of like nature plaintiff therein (grantor of Cook, defendant herein) filed a *lis pendens*. Defendant herein claims that he is unaffected by the *lis pendens* so filed, and as defendants therein filed no *lis pendens*, giving notice of affirmative relief asked by them, he is not bound by the judgment in their favor. But, *held*, by the *lis pendens* filed by the plaintiff in that action, his grantee had notice that while he, such plaintiff, claimed to be the rightful owner of the premises, the defendants therein claimed an interest adverse to him, and that the Court was asked to adjudicate upon the respective claims.

ID.—ID. Admitting (which the Court does not) that defendants in the former action were bound to file a notice of their claim for affirmative relief, as Cook had notice that an equitable action was pending, the judgment of the Court that his grantor had no title was binding upon him; and as he entered under the deed from such grantor, pending the litigation, claiming no other right than such as the deed conferred upon him, he is as much bound by the judgment that his grantor was not the owner as the grantor himself would have been.

Appeal from Twelfth District Court, San Francisco.

Latimer & Morrow, for appellants.

J. B. Hart, for respondents.

By the COURT:

In 1864, one Learned commenced an action against the plaintiffs herein and others, claiming to be the owner of the premises in controversy, alleging that the defendants therein (among whom were the plaintiffs here) claimed an interest in the premises adverse to him, and asked that his title be quieted. Learned filed a notice of the pendency of the action. The defendants in that action answered, alleging themselves to be the owners in fee, and prayed that the title be quieted as against their adversary, but they did not file any notice of the pendency of the action. Learned had judgment as prayed for, but on appeal this Court reversed the judgment and directed a judgment to be entered for the defendants as prayed for by them. Judgment was accordingly entered May 6, 1874. Pending that action, to wit, May 7, 1866, Learned conveyed the premises to Marcus M. Cook, defendant here. The deed contained a covenant of warranty "against all claims of John K. Moore and Merrit Welton et al." Merrit Welton was one of the defendants in that action.

The action now before us, commenced August 12, 1874, was brought to quiet the title of the plaintiffs to the premises, the plaintiffs alleging themselves to be the owners in fee, and defendants claim an interest adverse to them. The defendant M. M. Cook answers, claiming that he is the owner, and asks that his title be quieted. The defendant P. A. Cook claims as incumbrancer of his co-defendant.

The Court below found the facts as above stated, and also the following: That after the judgment in the former suit, a writ for the possession of the premises was issued, and was executed by the Sheriff on the ninth of May, 1874, by placing the Weltons in possession of the lot in controversy; and the Court also found that the defendant M. M. Cook went into possession of the premises on the seventh of May, 1866, the date of his deed from Learned, under that deed; that he neither has nor claims any title except such as he obtained by that deed or such as he may have acquired by the statute of limitations, and that he had held the possession adversely from the date of his entry under the deed to the date of the findings, December 11, 1879. The conclusion of law drawn by the Court was that plaintiffs' cause of action was barred by the statute of limitations, and judgment was accordingly rendered for defendants.

The defendant M. M. Cook claims that he is unaffected by the *lis pendens* filed by the plaintiff (his grantor) in the former suit, and that as the defendants therein filed no *lis*

pendens giving notice of the affirmative relief asked by them, he is not bound by the judgment in their favor. By the *lis pendens* filed by the plaintiff (Learned) in that action, his grantee (Cook, defendant here) had notice that while he, Learned, claimed to be the rightful owner of the premises, the defendants, Weltons, claimed an interest therein adverse to him, and that the Court was asked to adjudicate upon the respective claims; and admitting (which we do not) that in such case the Weltons were bound to file a notice of their claim for affirmative relief, as Cook had notice that an equitable action was pending, the judgment of the Court that Learned had no title was binding upon him; and as he entered under the deed from Learned, pending the litigation, claiming no other right than such as the deed conferred upon him, he is as much bound by the judgment that Learned was not the owner as Learned himself would have been. The first opinion filed in *Corwin vs. Bensley*, 43 Cal. 260, is not an adjudication upon this point, because a rehearing was granted, and in the judgment on rehearing the effect of the *lis pendens* filed by Corwin was expressly omitted from determination.

It may be observed that this action was brought within two years from the date of the judgment in the former action.

Judgment reversed and cause remanded for a new trial.

IN BANK.

[Filed October 5, 1882.]

No. 10,756.

PEOPLE, RESPONDENT, vs. COOK, APPELLANT.

ABDUCTION—FEMALE PROSTITUTION—FATHER—CUSTODY OF CHILD—CONSENT.

Upon a trial of accused for violating Section 267, Penal Code: "Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc.—the Court properly instructed the jury that the father has, by nature and by the law, the legal charge of the persons of his children until they arrive at the age of majority; and that if defendant took the female from such charge, for the purpose of prostitution, it was immaterial whether he knew that she had a father living; and was equally immaterial whether the act was done with or without her consent.

Id.—Id. The statute was intended not only for the protection of females under a certain age from the wiles and machinations of bad men, but was also intended to protect the family from sorrow and disgrace.

Id.—Id. The evidence showed that a female, between sixteen and seventeen years of age, was placed by her father in the employ of one Coleman, in the city of Sacramento, and having remained in the employ of Coleman for about one week, left without the consent or knowledge of her father. She then went to different places in that city and slept in several houses, leading a dissolute and immoral life, until she met defendant. An improper intimacy at once commenced between him and her, and, at its beginning, he proposed to her that she should go into a house of prostitution and support him out of money made by her as inmate of such house. This arrangement was carried into effect, and defendant took the girl to different houses of prostitution: *Held*, the evidence justified the verdict. When taken, the girl was, in contemplation of law, in the charge of her father.

Appeal from Superior Court, Sacramento County.

J. H. Budd, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court (McKinstry, J., and Sharpstein, J., dissenting):

The defendant was prosecuted by information, and convicted of violating Section 267 of the Penal Code, which reads as follows:

"Every person who takes away any female under the age of eighteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the State Prison, not exceeding five years, and a fine not exceeding one thousand dollars."

The evidence shows that one Rebecca Sproul, a female between sixteen and seventeen years of age, was placed by her father in the employ of one Coleman, in the city of Sacramento, and having remained in Coleman's service for about one week, she left there without the consent or even the knowledge of her father. She then went to different places in the city, and slept in several houses, leading a dissolute and immoral life, until she met the defendant, at the swimming baths in Sacramento. An improper intimacy at once commenced between the defendant and herself, and, at its beginning, he proposed that she should go into a house of prostitution, and support him out of the money made by her as an inmate of such a house. This arrangement was carried into effect, and the defendant took the girl, first, to a house of prostitution in Woodland, and afterwards to a house of the same character in Dixon. The Court below instructed the jury to the effect, that the father has by nature and by law, the legal charge of the persons of his children until they arrive at the age of majority, and that if the defendant

took Rebecca from such charge, for the purpose of prostitution it was immaterial whether the defendant knew that she had a father living and it was equally immaterial whether the act was done with or without her consent. This was correct. (*The Queen vs. Biswell*, 2 Cox's Cr. Cas. 279; *Reg. vs. Olfier*, 10 Id. 402.) When taken, the girl was in contemplation of law, in the charge of her father.

The statute was intended not only for the protection of females under a certain age from the wiles and machinations of bad men, but was also intended to protect the family from sorrow and disgrace.

We find in the charge of the Court to the jury no error, and are of opinion that the evidence was amply sufficient to support the verdict of the jury.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J., McKee, J.

DISSENTING OPINION.

I dissent. In my view the crime defined in Section 267 of the Penal Code is committed by one who "takes away" the infant from the actual charge or possession of her parent, guardian or other person legally entitled to the charge of her person. (Sec. 9, Geo. IV, C. 31, Sec. 20.) It is not committed by one forming an immoral connection with a female who has already abandoned her home or fled from guardianship.

There are cases in which it has been held that the English statute was violated, where the infant was persuaded to leave her home, and while under the influence of such persuasion, and as a part of a continuous design, joined the person to whose persuasion she had yielded, and went away with him for the purpose of prostitution. (*Reg. vs. Frazer*, 8 Cox's Cr. Cas. 446; *Reg. vs. Kipps*, 4 Id. 167; *Reg. vs. Manktelow*, 6 Id. 143.) But there is no case where one has been convicted under the statute who had no connection, by way of persuasion or otherwise, with the departure of the infant from her permanent or temporary home, or even any knowledge of an intended departure.

In *Queen vs. Biswell*, cited in the prevailing opinion, it was held that a man who took an infant from her father's house might be convicted, although the proposition to go away together emanated from the girl. In *Reg. vs. Olfier*, also cited in the prevailing opinion, it was held: "A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home." etc.

In the case before us the female was not taken away from

her father, or from Coleman, in whose employment she had been, or from any person having the legal charge of her. There is not the slightest pretense that the defendant induced her to leave the house of her father, or of Coleman, or that he ever saw her until she had, for a considerable period of time, "been going about from place to place, sleeping in several different houses, and leading a dissolute and immoral life." However base and infamous the conduct of defendant, he can only be punished, under this information, if he has committed the crime described in Section 267 of the Penal Code.

McKINSTRY, J.

I concur: Sharpstein, J.

IN BANK.

[Filed September 29, 1882.]

No. 10,728.

EX PARTE McLAIN ON HABEAS CORPUS.

SALE OF LIQUORS WITHIN PRESCRIBED LIMITS — UNIVERSITY — PUBLIC GROUNDS. Section 172 of the Penal Code, prohibiting the sale of liquors within certain limits of the University, Insane Asylum, etc., falls within the legislative power to pass laws for the promotion, regulation and preservation of the morals, health, prosperity, and general well-being of the people of the State.

ID.—CONSTITUTION. The above section having been enacted prior to the adoption of the Constitution of 1879, is not affected by it.

McAllister & Bergin, for petitioner.

Flournoy, Mhoon, and Lewis, for respondent.

MYRICK, J., delivered the opinion of the Court:

The petitioner was convicted of a misdemeanor for violating Section 172, Penal Code, and was adjudged to pay a fine of twenty-five dollars, in default of payment whereof he was restrained by the Sheriff. The section reads as follows:

"Every person who, within two miles of the land belonging to this State, upon which the State Prison is situated, or within one mile of the Insane Asylum at Napa, or within one mile of the grounds belonging and adjacent to the University of California in Alameda County, or in the State Capitol, or within the limits of the grounds adjacent and belonging thereto, sells, gives away, or exposes for sale, any vinous or alcoholic liquors, is guilty of a misdemeanor."

This section was enacted prior to the adoption of the new Constitution, and is unaffected by it.

The power to enact the law in question falls within that large class of powers belonging to the Legislature, essential to the promotion, regulation, and preservation of the morals, health, prosperity, and general well-being of the people of the State. All power rests in the Legislature not prohibited by the Constitution of this State or of the United States.

Under the late Constitution it was competent for the Legislature to prohibit the sale of vinous or alcoholic liquors within the limits specified in the section, if, in its opinion, the well-being of the youth being educated at the University, or the discipline and reformation of convicts, or the health of unfortunate insanes, would be thereby promoted or preserved.

Petitioner remanded.

We concur: Morrison, C. J., Ross, J., McKee, J.

CONCURRING OPINION.

I concur with Myrick, J., in the conclusion that the Act is constitutional, and am of opinion that it is neither in conflict with the present Constitution nor the former one.

THORNTON, J.

IN BANK.

[Filed October 5, 1882.]

No. 6936.

ROGERS ET AL., RESPONDENTS,

VS.

MAHONEY ET AL., APPELLANTS.

MALICIOUS PROSECUTION—BANK—DEPARTMENT. Opinion of Department No. 1 (9 Pac. L. J. 200), adopted by the Court in bank.

Appeal from Twelfth District Court, San Francisco.

Burnett and Hall, for appellants.

B. S. Brooks, for respondents.

By the Court:

This cause was heard in Department One of this Court, and its opinion filed March 20, 1882. (9 Pac. L. J. 200.) Subsequently the Court granted a hearing in bank, which has been had. We are satisfied with the opinion of the Department; and for the reasons therein given the judgment and order are reversed and the cause is remanded for a new trial.

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No. 9.

Supreme Court of California.

IN BANK.

[Filed October 3, 1882.]

No. 7290.

ORNBAUM, RESPONDENT,

VS.

HIS CREDITORS, APPELLANTS.

HOMESTEAD—RESIDENCE—INCLOSURE—POSSESSION. Plaintiff filed a declaration of homestead upon 1100 acres of Government land, over which he exercised control; 300 acres thereof were inclosed, within which inclosure he resided with his family. The balance of the land was used by him for grazing purposes. The 1100 acres did not exceed \$5,000 in value. *Held*, his residence within the inclosure was sufficient to cover the homestead right to the land outside the inclosure, within the meaning of the homestead law.

ID.—BOUNDARY—MOUNTAIN. A mountain or a range of mountains is a definite boundary of land.

DECLARATION OF HOMESTEAD—DESCRIPTION—DEED. It is not requisite that the description of land in a homestead declaration should be more particular than in a conveyance. A description good for a conveyance is valid for a homestead declaration.

ID.—TENANCY IN COMMON—GRAZING. The Court found that neighbors had grazed cattle upon the uninclosed portion in common with plaintiff, but at the same time recognized the lands as plaintiff's. *Held*, the relation of tenancy in common did not exist between plaintiff and such neighbors.

ID.—FINDING—EVIDENCE. Evidential facts have no proper place in the findings.

ID.—PRACTICE—NEW TRIAL—JUDGMENT—APPEAL. The sufficiency or insufficiency of the evidence to sustain the findings of fact cannot be reviewed on appeal from a judgment, there having been no motion for new trial, and no statement or bill of exceptions disclosing the evidence on which the Court below acted.

COORD.—OPINION. The opinion of the trial Court is not a part of the record of the case.

Appeal from Superior Court, Mendocino County.

Thomas B. Bond, for appellants.

Hillespie & Rogers, for respondent.

THORNTON, J., delivered the opinion of the Court:

There is no error in this record. The Court finds the following facts:

"This is an application by plaintiff, a petitioner in insolvency, to have a homestead set aside, and the Court finds, from the evidence, that plaintiff is a married man, and was on April 29, 1867, and has ever since been.

"That on April, 29, 1867, plaintiff filed and had recorded his declaration of homestead in the county of Mendocino; that the homestead was bounded as follows: On the north by Rancheria Creek; on the east by the ranches of Robert Stubblefield and Paddy Adams; on the south by what is known as Redwood Mountains, and on the west by Camp Creek. That said boundary embraced about eleven hundred acres.

"That at the time said declaration was filed, the lands were Government lands of the United States.

"That plaintiff, with his family, resided on said lands at the time he filed said homestead declaration, and has resided within said boundaries with his family ever since. That he inclosed with a fence about three hundred acres thereof. That he has at all times used the portion not inclosed for grazing. That the neighbors have also grazed the uninclosed portion in common with plaintiff, but at same time recognized the lands as plaintiff's.

"That some time about the year 1875, some three or more persons took up pre-emption claims of one hundred and sixty acres each, within said boundaries and occupied said pre-emption claims with permission of plaintiff, proved up said claims at Land Office, and obtained title thereto from the United States. That plaintiff was a witness for each of said pre-emptors at the Land Office.

"That plaintiff has since become invested with the title from said pre-emptors of the lands they pre-empted. That said lands do not exceed in value five thousand dollars." And upon these facts, ordered a decree for Ornbaum setting apart the homesteads, which was accordingly entered.

The Court found all the facts essential to the constitution of a homestead. There was no motion for a new trial, and this appeal is from the judgment.

Now it is objected that Ornbaum had no actual residence on the land outside of his inclosure at the time the declaration of homestead was filed. His residence within the inclosure was sufficient upon the facts as found. He had title to and exercised control over all the land. The evidential facts inserted in the findings of fact (we refer to those as to

the neighbors grazing the uninclosed portion, and the taking up of pre-emption claims on the land) have no proper place there, but they, with the other facts found and which follow them in order in the findings, sustain the judgment of the Court.

The other objections are expressed as follows: 1. We think Ornbaum had no interest whatever in the land, but if he did, it was only a tenancy in common; and 2, the premises were not particularly described in the declaration as expressly required in the amendatory Act of April 28, 1860.

We do not think these objections are tenable. It is evident on the findings of fact that there was no tenancy in common, and as to the description, it would be sufficient to pass the land in a conveyance, and we do not think the Act of April 28, 1860, (see Section 2 of said Act, Acts of 1860, p. 311,) require a more particular description in a declaration of homestead than is required in a deed. It would be a novel proposition of law in this State, that a mountain, or range of mountains, is not a definite boundary of land. It is as much so as a tree, a rock, or a stream one-half mile wide, in which the boundary would go *ad medium filum aquae*. The boundary usually goes to the middle of the natural object named, except in the case of a range of mountains, when it goes to the comb, or dividing line of the ridge. A deed is always construed *ut res magis valeat quam pereat*. This rule applies to a declaration. See *Roe vs. Tranmarr*, 2d Smith's Lead. Cas. *448; Broom's Legal Maxims *521-2-3.

We will add here that the paper in the transcript designated by the heading "Finding and decision of Court," on pages 15 and 16 of the transcript, is the opinion of the Court, and does not belong properly to the record. The findings of fact are on pages 17 and 18, and are inserted above. The former paper, in our opinion, does not militate against the conclusion here reached.

At any rate there was no motion for a new trial, and no statement or bill of exceptions disclosing the evidence on which the Court below acted. We cannot therefore determine the sufficiency or insufficiency of the evidence to sustain the findings of fact.

The judgment is affirmed. So ordered.

We concur: McKee, J., Sharpstein, J., Morrison, C. J.

DISSENTING OPINION.

This is an appeal from an order setting aside a tract of land as a homestead. The tract contains about eleven hundred acres. The declaration was filed April 29, 1867, and

in it the premises claimed were bounded as follows: On the north by Rancheria Creek, on the east by the ranches of Robert Stubblefield and Paddy Adams, on the south by what is known as Redwood Mountains, and on the west by Camp Creek. At that time the lands were Government lands of the United States. The findings of the Court are: That there were no definite or certain landmarks or boundaries dividing the lands of Ornbaum from the lands of the other persons named in the declaration except a mountain on one side about half a mile wide; that of the lands described in the declaration about three or four hundred acres were inclosed by a fence, in which inclosure was the dwelling house of Ornbaum; that several hundred acres of the land claimed was uninclosed public land of the United States, with no visible boundaries except as above stated; that the only right, title, interest or possession which Ornbaum had in the uninclosed land at the time of the declaration was that he had some cattle, horses and live stock running and grazing thereon with the live stock of all other persons who chose to occupy the land in the same manner that the neighbors who grazed the uninclosed land in common with Ornbaum recognized the land as his; that Ornbaum resided with his family within the inclosure, and that no other person resided within the exterior boundaries of the land described; that about 1875 some three or more persons took up pre-emption claims of one hundred and sixty acres each within said boundaries and occupied the same, with permission of Ornbaum, he being a witness for each at the Land Office, proved up the claims and obtained title from the United States, which title Ornbaum thereafter became invested with, and that the entire tract does not exceed in value five thousand dollars. Upon these findings of fact, the Court, as conclusion of law, found "that the said John S. Ornbaum had an actual possession of the land described in said declaration of homestead at the time said declaration was made and filed;" and thereupon the Court made its decree setting apart the entire premises as a homestead.

I think this was error. According to the findings of fact, Ornbaum was in possession of the inclosed premises only; he had not such possession of the uninclosed land as was requisite for a homestead. (Act of April 28, 1860; Stats. 1860, p. 311.) His neighbors were as much in possession as he, and each of them could with equal force have filed a declaration. The object of the law in protecting a homestead, is not to afford a place for carrying on business, whether stockraising, carpentering, hotel keeping, merchandizing or

any other; the object is to afford a home, a residence for the family, and Ornbaum had by his inclosures ascertained and determined how much he deemed necessary or convenient for that purpose. It may be very convenient for stockraising to have a tract of eleven hundred acres, but it does not appear that the claimant has placed himself in such a position as to have the whole tract set apart as a homestead. There may be cases where the claim may include lands not actually inclosed; for example, where a house is upon a portion of a well-defined lot in a town or city, or, where a party has title to a tract, a portion only of which is inclosed; or where the uninclosed lands are being cultivated; but we do not think the case at bar parallel with such cases. (Gregg vs. Bostwick, 33 Cal. 220.)

The proofs required to be made by the parties who, in 1875, took up pre-emption claims of one hundred and sixty acres each within the boundaries (which proofs Ornbaum joined in making, and which pre-emptions were had with his consent), were entirely consistent with the theory that he (Ornbaum) was in possession. He could not have been in possession and yet have truthfully aided those parties in acquiring pre-emption rights. It is true that the pre-emptions were had after he filed his declaration, but he had no other or further possession at the one time than at the other.

Upon the facts as found by the Court below the judgment should be reversed and the cause remanded for further proceedings; the homestead to be limited to the lands which were inclosed at the time of the filing the declaration.

MYRICK, J.

IN BANK.

[Filed October 4, 1882.]

No. 10,759.

PEOPLE, RESPONDENT, vs. GANNON, APPELLANT.

CRIMINAL LAW—CONTINUANCE—AFFIDAVIT—WITNESS. The affidavit of the District Attorney, upon which the continuance was granted, was regular and sufficient.

Tr.—DEPOSITION. The Court was justified in finding that the witness Avery could not, with reasonable and due diligence, be found in the State. His deposition taken before the examining magistrate was, therefore, admissible (686, Pen. Code.)

—DISTRICT ATTORNEY—PRESUMPTION—VIOLATION OF DUTY—SUBPENA. The Court will not presume that a District Attorney induced a witness to withdraw to a particular part of the State, or, being informed of such withdrawal, sent subpoenas to other portions of the State.

INSTRUCTION—LARCENY—ROBBERY. The charge was robbery, and the verdict, guilty thereof. The instruction complained of was addressed by its very terms to the accusation charged in the information, that defendant had taken certain moneys from the person of the prosecuting witness by force or violence. The instruction did not induce the jury to believe they could find the defendant guilty of the crime charged, if the evidence showed he took a hat from the prosecuting witness.

Id.—Id. As there was no evidence of the wrongful taking of any money of the prosecuting witness, except from his person, the Court correctly charged that—if the evidence sustained the other facts charged—in the absence of force or violence, the verdict might be grand larceny. The Court was not then defining larceny, nor measuring the *quantum* of evidence necessary to conviction; but, in effect, explaining that a larceny from the person was "grand larceny," whatever the amount stolen. The jury could not have inferred from the language that a taking without gainful purpose, or otherwise innocent, would constitute larceny; nor could they have inferred that the defendant ought not to have the benefit of the rule, "reasonable doubt."

Appeal from Superior Court, San Joaquin County.

J. A. Hosmer, for appellant.

Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

It is not seriously contested, but the affidavit of the District Attorney upon which the continuance (from the 28th of September to the 5th of October) was granted was regular and sufficient.

We think the Court below was justified in finding that the witness, Edwin Avery, could not, with reasonable and due diligence, be found in the State. His deposition, taken before the examining magistrate, was, therefore, admissible. (P. C., 686.)

Of course it is possible that a District Attorney—in violation of his official oath, and in cruel disregard of the rights of those charged with crime—*might* so far prostitute his place as to enter into a scheme to deceive the Court and defendant. He might induce a witness to withdraw to a particular part of the State, or being informed of such withdrawal, he might send subpoenas to other portions of the State. But, to say the least, such conduct is not to be presumed. The prosecution can have no real interest to be subserved by influencing a prosecuting witness to conceal or absent himself. It was admitted that the witness could not, "with due diligence," be found in San Joaquin County. There being no evidence to suggest that, with the knowledge of the prosecution, the witness had gone to a county to which the subpoenas issued did not run, or that facts had come to the knowledge of those controlling the prosecution, which should have induced them to believe that the witness had

gone to a county to which the subpoenas issued did not run, we cannot say the Court below found against the evidence, or abused its discretion, in holding that the witness could not, by the exercise of due diligence, be found within the State. There was a considerable body of evidence to sustain the finding.

The instruction of the Court complained of was addressed by its very terms to the accusation charged in the information, that defendant had taken certain *moneys* from the person of the prosecuting witness by force or violence. We are persuaded the instruction did not induce the jury to believe they could find defendant guilty of the crime charged, if the evidence showed he took a *hat* from the prosecuting witness.

As there was no evidence of the wrongful taking of any money of the prosecuting witness, except from his person, the Court correctly charged that, if the evidence sustained the other facts charged, in the absence of force or violence, the verdict might be grand larceny. (P. C., 487.) The Court was not then defining larceny, measuring the *quantum* of evidence necessary to a conviction, but, in effect, explaining that a larceny from the person was "grand larceny" whatever the amount stolen. The jury could not have inferred from the language that a taking, without gainful purpose, or otherwise innocent, would constitute larceny; nor could they have inferred that the defendant ought not to have the benefit of the rule "reasonable doubt."

Judgment and order affirmed.

We concur: Ross, J., Morrison, C. J., Sharpstein, J., McKee, J., Myrick, J.

IN BANK.

[Filed October 6, 1882.]

No. 6978.

SHACKELFORD, RESPONDENT,

VS.

POST PUBLISHING COMPANY, APPELLANT.

CONFLICT OF TESTIMONY—APPEAL—FINDINGS. Where there is a substantial conflict in the evidence, the appellate Court will not interfere with the findings of the Court below.

Appeal from Twelfth District Court, San Francisco.

Estee & Boalt, for appellant.

Jarboe & Harrison, for respondent.

By the COURT (Myrick, J., dissenting):

The Court below found the employment of plaintiff by defendant as its secretary, the rendition of services under such employment, and the value of such services. The Court also found that the plaintiff had not undertaken or agreed that the services should be rendered by him gratuitously. Judgment went for plaintiff.

It seems to us that there is a substantial conflict in the evidence as to whether the services were to be rendered gratuitously; and, in view of the rule established here, we will not interfere with the findings.

Judgment and order affirmed.

DISSENTING OPINION.

I am of the opinion that the testimony shows that plaintiff by his action permitted the defendant to receive his services as secretary, and to rest under the belief that such services were being rendered gratuitously; and that he in rendering those services, expected or hoped (without any agreement to that end), to receive some compensation or equivalent by a voluntary apportionment to himself of some shares of the stock of defendant. Under such circumstances the plaintiff is not entitled to recover as for services rendered. The finding of the Court below is not sustained by the evidence.

MYRICK, J.

IN BANK.

[Filed October 9, 1882.]

No. 7347.

HALL, APPELLANT, vs. THEISEN, RESPONDENT.

TAX DEED — ASSESSMENT — CERTIFICATE OF SALE — INJUNCTION — CLOUD ON TITLE — EXECUTION — PLEADING. (*Per Myrick, J., Ross, J., and McKinstry J., concurring.*) Injunction to restrain a sale of real property under execution against prior owners. Plaintiffs claim under a tax sale and deed. *Held*, the deed is void, it being therein recited that the property was assessed to "California Consolidated Mining Company and to all owners and claimants known and unknown." (*Hearst vs. Egglestone*, 55 Cal. 365.)

Id.—Id. The complaint for injunction alleged an assessment of the property to the above company, omitting the objectionable addition expressed in the deed. *Held*: Admitting that if plaintiff holds a valid certificate of sale for non-payment of taxes, he may have the sale under

execution enjoined on the ground that such subsequent sale would be a cloud upon his title or his right to have title, yet, in endeavoring to have the sale enjoined he must aver and show that he has full right to protection; in other words, that every thing that has occurred which would be necessary to occur in order to vest in him the right claimed.

Id.—Id. The allegation in the complaint as to the tax sale is that the property "was duly sold to satisfy the aforesaid taxes at public auction, by the Tax Collector of said county of El Dorado to A. Miersen, to whom a certificate of said sale was delivered by said Tax Collector." Held: Insufficient. There is no allegation that either of the steps referred to by Sections 3766, 3767, or 3768, Political Code—manner of publication of notice, etc., time and place of sale, etc.—had been taken.

Id.—Id. Section 3766, Political Code, declares that the certificate of the sale shall state certain matters. There is no allegation that the certificate stated either of those matters.

Id.—Id. The Code does not make the certificate evidence of any matter not therein stated; nor of any matter necessarily preceding its valid existence.

Id.—Id. McKee, J., Thornton, J., and Sharpstein, J., concurred on the ground that plaintiff has an adequate remedy at law.

Appeal from Superior Court, El Dorado County.

Smoot and Miller, for appellant.

Jarboe & Harrison and O'Brien, for respondent.

MYRICK, J., delivered the opinion of the Court:

This action was brought to obtain an injunction restraining the defendants from selling certain real property under an execution. The plaintiff claimed under a tax sale and deed; the defendants were proceeding to sell under an execution against the prior owners. The defendants demurred, the demurrer being sustained, and no amendment made, judgment went for defendants. A preliminary injunction having been issued, the same was dissolved.

The tax deed is void, it being therein recited that the property was assessed to "California Consolidated Mining Company and to all owners and claimants known and unknown." (*Hearst vs. Egglestone*, 55 Cal. 365.)

The complaint alleges an assessment of the property to the California Consolidated Mining Company, omitting the objectionable addition expressed in the deed. It may be admitted that if the plaintiff holds a valid certificate of sale for non-payment of taxes, he may have the sale under execution enjoined, on the ground that such subsequent sale could be a cloud upon his title or his right to have title. But, in endeavoring to have the sale enjoined, he must aver and show that he has full right to protection; in other words, that everything has occurred which would be necessary to occur in order to vest in him the right claimed. The allegation in the complaint as to the tax sale is that the property

"was duly sold to satisfy the aforesaid taxes, at public auction, by the Tax Collector of said county of El Dorado, to A. Miersen, to whom a certificate of said sale was delivered by said Tax Collector." There is no allegation that either of the steps referred to by Sections 3766, 3767, or 3768, Political Code, had been taken. Section 3776 declares that the certificate of the sale shall state certain matters. There is no allegation that the certificate stated either of those matters. The allegation in the complaint is that "a certificate of said sale was delivered," etc. We have not been referred to any provision in the Code which makes the certificate evidence of any matter not therein stated, nor of any matter necessarily preceding its valid existence.

This appeal is from the order dissolving the injunction. The order is affirmed.

We concur: Ross, J. McKinstry, J.

CONCURRING OPINION.

We concur in the judgment, on the ground that the plaintiff has an adequate remedy at law.

McKEE, J., THORNTON, J., SHARPSTEIN, J.

DEPARTMENT No. 1.

[Filed October 12, 1882.]

No. 8573.

AH GOON, PETITIONER,

VS.

SUPERIOR, COURT, RESPONDENT.

INTERVENTION—JURISDICTION—TRIAL. Without admitting that the jurisdiction of the Superior Court, with respect to the matter of intervention, is, in the strict sense, statutory and limited, even if this much should be admitted, the Court below in this case acquired jurisdiction by the order permitting intervenor to become a party.

ID.—ID. A person may intervene before the trial. (C. O. P. 387.) An intervention "takes place" when the order is made permitting such person to become a party. (Id.)

ID.—ID. The complaint in intervention is filed when "leave of the Court" is granted, which necessarily precedes its service.

ID.—ID. When the complaint in intervention is filed (by leave of the Court) a trial before its service on the party against whom the intervenor asserts an adverse claim is premature; but an erroneous procedure in that regard does not involve any question of jurisdiction.

I. C. Van Ness, for petitioner.

Wm. Matthews, for respondent.

By the COURT:

Petitioner for the writ of prohibition claims that Section 387 of the Code of Civil Procedure confers a special and limited jurisdiction on the Superior Court, which can be exercised only in case the complaint in intervention is both filed and served "before the trial."

In the case before us the order permitting intervenor to become a party was made, and the written intervention *filed*, before the trial. But before service of the complaint of intervenor, plaintiff and defendant proceeded to try the issues between them, which was doubtless irregular unless the attempt to intervene was *void*.

Without admitting that the jurisdiction of the Superior Court with respect to the matter of intervention is, in the strict sense, statutory and limited, even if this much should be admitted, the Court below acquired jurisdiction by the order permitting intervenor to become a party. A person may intervene before the trial. (C. C. P. 387.) An intervention "takes place *when* the order is made permitting such person to become a party." (Id.) The complaint in intervention is filed when "leave of the Court" is granted, which necessarily precedes its service.

Of course when the complaint in intervention is filed (by leave of the Court) a trial before its service on the party against whom the intervenor asserts an adverse claim is premature; but an erroneous procedure in that regard does not involve any question of jurisdiction.

Demurrer sustained.

IN BANK.

[Filed October 5, 1882.]

No. 10,775.

PEOPLE, APPELLANT, vs. EMMONS ET AL., RESPONDENTS.

ASSAULT—WINDOW—BUILDING—CHINAMAN—INDICTMENT—BODILY INJURY.

The indictment stated in effect that defendant threw a Chinaman out of the window of a building, which window was situate in the third story thereof, with force and violence, etc., causing him to fall a distance of twenty-five feet, whereby he was greatly injured, etc. *Held*, the indictment was good under Section 245, Penal Code.

Appeal from Superior Court, Contra Costa County.

Attorney-General Hart, for appellant.

Foote and Emmons, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

The indictment found and presented against the defendants charges that "on the 26th day of April, 1882, they, acting together and without authority of law, did riotously, unlawfully, and tumultuously assemble together for the purpose, and with the intent, fifty persons and more of the China nation, whose names are to the jurors unknown, then and there being, etc., with force and violence, unlawfully, riotously, and tumultuously, then and there to drive out of said building and from said town of Martinez, and so being assembled, etc., unlawfully, riotously, tumultuously, and with force and violence upon the person of one Ah Wee, a Chinaman then and there being, did commit an assault, and him, the said Ah Wee, unlawfully, riotously, tumultuously, and with force and violence, did then and there seize and throw out of the attic window of said Old Corner building, which said window was then and there situate in the third story from the ground in said building, * * * and did then and there and thereby, etc, with force and violence, cause the said Ah Wee to fall from said window to the ground, a distance of twenty-five feet, whereby he was greatly injured and became sick and sore therefrom."

To the foregoing indictment a demurrer was interposed on behalf of the defendants, which was sustained by the Court, and the appeal is on behalf of the people.

We think the indictment was good under Section 245 of the Penal Code, which reads:

"Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by means of force likely to produce great bodily injury, is punishable by imprisonment in the State Prison, or in the County Jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both."

The facts constituting the offense are fully stated in the indictment; they amount to a felony, and if proved as laid, justify a verdict of guilty, under the foregoing section.

If such an act of violence had resulted in the death of the party assaulted, the perpetrators of it would have been guilty, at least, of manslaughter, and perhaps of murder under the law. If one person maliciously and with premeditation seizes another and throws him out of a third story window twenty-five feet from the ground, and thereby causes his death, or if with the same purpose and intent, one casts another into the sea, whereby the latter drowned, there is no reason why the perpetrator of such an act should not be guilty of murder in the same degree that he would if a pistol or knife were used, as the means of producing death.

The Court erred in sustaining the demurrer. The judgment is therefore reversed and the cause is remanded, with instructions to the Court below to overrule the demurrer to the indictment.

We concur: Thornton, J., Myrick, J., McKee, J., Ross, J.
I concur in the judgment: McKinstry, J.

IN BANK.

[Filed October 9, 1882.]

No. 10,740.

PEOPLE, RESPONDENT, VS. STRANGE, APPELLANT.

HOMICIDE—SELF-DEFENSE—ILLICIT INTERCOURSE—INSTRUCTIONS. The homicide was committed at the house of deceased while defendant was in the act of fleeing therefrom, where he had been in illicit intercourse with the wife of deceased. The Court in its charge distinctly accorded to defendant the right of self-defense. *Held*, no error was committed in striking out from defendant's instruction the words, "He had the same right there that he would have had if attacked upon the public streets of the town."

Id.—Id. While, if closely analyzed the additional words may appear to convey a proposition abstractly correct, the Court is of opinion that, in view of the evidence, they would have had a tendency to mislead the jury, by inducing them to believe that the fact of defendant's presence at the house, with the circumstances attending it, were to be excluded from consideration in determining the question of justification.

Id.—VERDICT—MANSLAUGHTER. The verdict of manslaughter is sustained by the evidence.

Appeal from Superior Court, Santa Cruz County.

Moore, Laine & Johnson, Lee, and Kittredge, for appellant.
Attorney-General Hart and W. D. Storey, for respondent.

MYRICK, J., delivered the opinion of the Court:

The information in this case accused the defendant of the crime of murder, and the jury returned a verdict of guilty of manslaughter.

First—There seems to be no conflict in the evidence as to the fact of the homicide by the defendant. The defendant (examined as a witness on his own behalf) is the only person who testified as an eye-witness of the transaction; and as he testified to matters which he thinks justified him in taking the life of deceased, because in self-defense, he claims that the evidence did not justify the verdict. It was for the jury to determine how much of the statement of the defendant they should believe and how far it would carry conviction

to their minds. They seem to have attached some importance to it, by rendering a verdict of guilty of manslaughter instead of murder. We see no error here which tended to the prejudice of the defendant.

Second—The Court committed no error in omitting from the instructions asked for those sentences not given.

The Court in its charge distinctly accorded to the defendant the right of self-defense. This was all he was entitled to. We cannot perceive that any error was omitted in striking out the words of which complaint is made.

While, if closely analyzed, the additional words may appear to convey a proposition abstractly correct, we are of opinion that, in view of the evidence, they would have had a tendency to mislead the jury, by inducing them to believe that the fact of defendant's presence at the house, with the circumstances attending it, were to be excluded from consideration in determining the question of justification. |

Judgment and order affirmed.

We concur: McKee, J., Ross, J., McKinsty, J., Sharpstein, J., Thornton, J.

IN BANK.

[Filed October 3, 1882.]

No. 7215.

REED ET AL., RESPONDENTS,

VS.

ALLISON ET AL., APPELLANTS.

SERVICE BY MAIL—NOTICE OF APPEAL. According to the provisions of Section 1014, C. C. P., the conditions involved in the fact of service of a notice of appeal by mail are (1), that the person making the service and the person on whom it is to be made reside or have their offices in different places, and (2), that there shall be a regular mail communication between the places.

Id.—Id. The attorney for the appellant caused a copy of the notice of appeal, properly directed, etc., to be mailed at San Jose, where he neither resided nor had an office. *Held*, the service by mail was insufficient.

Id.—Id. To constitute service by mail, the deposit in the post-office must be made in the post-office at the place where the attorney making the service resides or has his office, provided there be a regular communication by mail between it and the post-office of the place where the person on whom the service is to be made resides or has his office.

Id.—AFFIDAVIT—EVIDENCE. The affidavit of service must show a strict compliance with the provisions of the statute, otherwise the evidence must be held insufficient to establish the fact of service.

Id.—APPEAL—JURISDICTION—RECORD. The appellate Court does not acquire jurisdiction of an appeal unless the record shows that the notice of appeal was served according to law.

Id.—PARTITION—APPEAL. On appeal from the final judgment in an action of partition it is necessary that notice of appeal be served upon all the parties respondent, else the appeal will be ineffectual.

Appeal from Twentieth District Court, Santa Clara County.

J. M. Seawell, for appellants.

Houghton & Reynolds and *Lieb*, for respondents.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action of partition in which the parties to the action are all actors or plaintiffs, each against each and all others. The case comes before us on appeal from the final judgment. On such an appeal it is necessary that notice of appeal should be served upon all the parties respondent, else the appeal will be ineffectual (*Bernal vs. Senter*, 38 Cal. 638); and, because, as it is contended, notice of the appeal has not been served upon some of the respondents nor their attorneys, a motion is made to dismiss the appeal.

The notice of appeal is dated April 10, 1880. At that time the attorney of appellant and some of the parties and the attorney of the parties to be served, resided and had their offices in different counties. The attorney for the appellant resided in San Rafael, Marin County. Of the attorneys for respondents some resided in San Francisco, Los Angeles, San Jose, San Diego, Redwood City, and one of the parties in Plattsburg, in the State of Missouri. Between San Rafael and each of those places there was, at the time, a regular communication by mail. The situation was therefore such that the attorney for the appellant could have served the notice of appeal by mail, by following the provisions of Section 1013, Code of Civil Procedure.

According to those provisions, the conditions involved in the fact of service by mail are (1) that the person making the service and the person on whom it is to be made reside or have their offices in different places, and (2) that there shall be a regular mail communication between the "places." Upon the existence of these conditions service may be made upon the party or his attorney by depositing the notice in the post-office, addressed to the person to be served, at his office or place of residence, and the postage paid. When the deposit is made in the post-office the service is deemed complete. (Section 1013, *supra*.)

The attorney for the appellant caused a copy of the notice

of appeal, properly directed, etc., to be mailed at San Jose, where he neither resided nor had an office, and did not mail it at San Rafael where he did reside. But between San Jose and the places named there was a regular communication by mail; and the question arises, in what post-office must the deposit of the notice be made to constitute service? Can it be made in any of the counties of the State?

Undoubtedly the object of depositing the notice in a post-office, in the manner prescribed by the law, is the transmission of the notice by mail to the person to whom it may be directed. For that purpose, the notice must be deposited in one or other of the post-offices of the places where the parties have their residences or offices, because these are the only places mentioned in the Code within the conditions of service. But a deposit in a post-office in the county or place in which a party who may be served by mail has his residence or office, would not constitute service on him by mail, because a service on him at his residence or office in his own county, to be effectual, must be made personally or constructively, in the manner prescribed by subdivisions 1 and 2 of Section 1011, Code of Civil Procedure. It could not be made by mail, unless the residence of the attorney or party to be served was unknown. (*Id.*) Therefore, to constitute service by mail, the deposit in the post-office must be made in the post-office at the place where the attorney making the service resides or has his office, *provided* there be a regular communication by mail between it and the post-office of the place where the person on whom the service is to be made resides or has his office. (*Corning vs. Gilman*, 1 Barb. 649.)

Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular mail communication; and the affidavit of service must show a strict compliance with the provisions of the statute, otherwise the evidence must be held insufficient to establish the fact of service. (*People vs. Turnpike Co.*, 30 Cal. 182.) In other words, when service is sought to be made by mail, it should appear that the conditions on which the validity of such service must depend had existence, otherwise the evidence will be deemed insufficient to establish the fact of service. (*Clark vs. Adams*, 33 Mich. 164.)

In *People vs. Turnpike Co.*, *supra*, the affidavit of service omitted to show the existence of a regular communication by mail between the two places of the residences of the attorneys for the appellants and the respondents; and the

appeal was dismissed because there was no effectual service of the notice. In *Moore vs. Besse*, 35 Cal. 184, the affidavit of service omitted to show that the attorney making the service resided at the place where the notice of appeal was mailed, and the appeal was also dismissed because the service was insufficient.

In the case in hand the record shows affirmatively that the attorney who made the attempted service did *not* reside at the place where he mailed the copy of the notice of appeal; and it follows, upon principle as well as precedent, inasmuch as the attempted service of the notice of appeal has not been made according to the provisions of Section 1013, Code of Civil Procedure, that the appeal must be dismissed. This Court does not acquire jurisdiction of an appeal, unless the record shows that the notice of appeal was served according to law. (*Franklin vs. Reiner*, 8 Cal. 340; *Buffendeau vs. Edmundson*, 24 Id. 94.)

Appeal dismissed.

We concur: Sharpstein, J., Morrison, C. J., Myrick, J.

IN BANK.

[Filed October 12, 1882.]

No. 10,756.

PEOPLE, RESPONDENT, vs. DARR, APPELLANT.

CRIMINAL LAW—VERDICT—EVIDENCE—NEW TRIAL. The evidence was not so clearly insufficient to justify the verdict as to justify the appellate Court in reversing the order denying the motion for a new trial.

CHALLENGE JURORS. The challenge to the panel of jurors composed of persons summoned by order of the Court from the bystanders was not based upon any of the grounds specified in the Code.

DISTRICT ATTORNEY—DEPUTY—INFORMATION. The name of the District Attorney was subscribed to the information by his deputy. That was sufficient.

TRIAL—SWEARING JURORS—PRESUMPTION. Error was alleged on appeal that the Court below proceeded with the trial of the case without all the jurors being first sworn. It does not positively appear whether or not the juror, McPeak, was sworn to try the cause. So long as it does not appear that he was not sworn, the presumption is that the Court performed its duty.

INSTRUCTIONS. Taken as a whole the instructions fairly stated the law applicable to the case.

Appeal from Superior Court, Mendocino County.

J. A. Cooper, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The evidence upon which the defendant was convicted was of that kind commonly denominated "circumstantial," but it was not so clearly insufficient to justify the verdict as to justify this Court in reversing the order denying the motion for a new trial on that ground.

The challenge to the panel of jurors composed of persons summoned by order of the Court from the bystanders was not based upon any of the grounds specified in the Code, and, therefore, it was not error to disallow it.

The name of the District Attorney was subscribed to the information by his deputy. That was sufficient. It does not positively appear whether or not the juror McPeak was sworn to try the cause. So long as it does not appear that he was sworn, it is safe to presume that the Court performed its duty. Taken as a whole, we think that the instructions given to the jury fairly stated the law applicable to the case.

Judgment and order affirmed.

In the Superior Court, Sacramento.

WILLIAM T. WILSON vs. ELLEN M. WILSON.

DEED INTENDED AS MORTGAGE—RULE OF EVIDENCE. In this State it is an established rule that, in order to show that a deed absolute in terms was intended as a mortgage, the evidence must be clear of a reasonable doubt.

CONFLICT BETWEEN FEDERAL AND STATE DECISIONS. Where there is a conflict between the decisions of the Supreme Court of the United States and of this State upon a question of general jurisprudence not peculiarly within the jurisdiction of the Federal Courts, the Courts of this State will follow the decisions of the State Supreme Court.

DEED NOT A MORTGAGE. Where it appeared that a husband, being embarrassed financially, conveyed "2000 acres of land, more or less," to his wife for a consideration of \$7,000, taking an agreement from her that, upon payment to her within one year of the sum of \$7,000 with interest at one per cent. per month, she would reconvey the land to him, he to retain possession during the year; that the agreement was lost and the evidence was conflicting as to whether it contained recitals of a loan, sufficient to constitute it a simple defeasance; that she had expressly refused to take a mortgage; that he retained possession during the year, and, being unable to pay the sum named, delivered the possession to her in the belief that, as the result of the contract, the law gave her the land, and she retained possession for four years making improvements thereon; *Held*, that the evidence was not sufficient to show the deed was intended as a mortgage, and not a conditional sale—although the wife had frequently said in casual conversation that she had loaned the money and taken the land as security."

ADMISSIONS AS EVIDENCE. The admissions of a party made in casual conversation, though against his own interest, are to be taken with great caution, because of the danger of mistake as to the language used or the meaning intended.

WAYMIRE, J.:

This is an action in which the plaintiff, who is the husband of defendant, seeks to have a deed absolute in terms declared to be a mortgage and to be allowed to redeem therefrom. The complaint was filed May 3, 1881. It alleges that on November 26, 1875, the plaintiff borrowed \$7,000 from the defendant, which he then and there agreed to repay to her within one year with interest at one per cent. per month; that at the same time, for the sole purpose of securing the payment of the money, the plaintiff executed and delivered to the defendant a deed, absolute in form, purporting to convey a tract of land described particularly, and also as containing "about two thousand acres, more or less;" that contemporaneously with the execution and delivery of the deed the defendant executed and delivered to plaintiff an agreement in writing, whereby she promised to reconvey the land to the plaintiff upon repayment by him within one year thereafter of the \$7,000 with interest at one per cent. per month; that such deed and agreement were intended to be a mortgage to secure the loan; that in accordance with the terms of the agreement the plaintiff remained in possession of the land for one year after the date of the deed, and at the end of the year, being then unable to repay the money, delivered possession of the land to the defendant, who has ever since remained in the exclusive possession of it. There are other allegations as to the value of the use and occupation, a demand for an accounting, a tender of the amount due the defendant, and a request that she reconvey, which was refused. The prayer is, that upon the payment by plaintiff of the sum due the defendant, she be required to reconvey. The answer denies there was any loan or mortgage, or any transaction other than as follows: The defendant purchased the land from the plaintiff for \$7,000, taking the deed in suit November 26, 1875, and at the same time agreed the plaintiff should remain in possession for one year, and might, at any time during the year, repurchase the land if he should choose so to do for the sum of \$7,000 and interest thereon at one per cent. per month from November 26, 1875; that the plaintiff did not at any time elect to repurchase the land, but on or about November 26, 1876, notified the defendant that he could not repurchase the same and surrendered the possession to the defendant as the owner in fee, since which time she has remained in possession, paid the taxes, amounting to \$580, made improvements at a cost of \$225, and arranged for pasturing her sheep, rented out other lands, and made divers business changes with reference to her ownership of this land.

The sole issue presented by these pleadings was as to whether the transaction of November 26, 1875, was a mortgage or a sale with the reserved right in the vendor to repurchase within one year.

The case was tried in December, 1881, by Hon. S. C. Denson, Judge of the Superior Court, Sacramento County, and judgment was rendered for the defendant. A motion for a new trial having been made and granted the case was again tried in June last, when, at the request of Judge Denson, I presided in his stead. The second trial, which was conducted by distinguished counsel on both sides, occupied several days; the testimony was then written out in full, and I have carefully considered it in the light of able and exhaustive arguments, presenting the authorities bearing upon the subject.

It is now settled law that when a deed absolute in form is executed as security for a loan of money, a Court of equity will treat it as a mortgage. "The Court looks beyond the terms of the instrument to the real transaction," says the Supreme Court of the United States, per Mr. Justice Field, in a recent case, "and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the Court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the *language* used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the *object* of the parties in executing and receiving the instrument." (*Peugh vs. Davis*, 96 U. S. 336.)

If the deed be ascertained to have been intended as a mortgage, the equity of redemption becomes so inseparably connected with it that it cannot be defeated in any manner—cannot even be waived by express stipulation of the mortgagor. Courts of equity never deviate from this rule, for they deem it essential to the protection of the debtor whose necessities may compel him to yield to ruinous conditions. (*Id.*) Our Code has expressly enacted that "all contracts in restraint of the right of redemption from a lien are void." (C. C., Sec. 2889.)

The Supreme Court of this State, in a late case—opinion delivered by Mr. Justice McKee—say: "Whether a deed absolute in form be a mortgage, is a question of intention to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution. In such cases the central fact to be found is the existence of an indebtedness at the time of the transaction and a continuation of the relation of debtor and creditor." (*Montgomery vs. Spect*, 55 Cal. 353.) In another case the same Court say: "In cases of this class the well

established test by which to determine whether the transaction is a mortgage or a defeasible sale, is the fact whether or not, notwithstanding the conveyance, there is a subsisting, continuing debt from the grantor to the grantee." (*Farmer vs. Grose*, 42 Cal. 172.)

It is important, in attempting to apply this test, first to ascertain the rule by which the evidence is to be weighed. If the written evidence require the aid of parol evidence to explain it, as it usually does, there is often a conflict in the evidence which it is difficult or impossible to reconcile. In some of the States the Courts act upon the rule that in all doubtful cases the contract will be construed to be a mortgage rather than a conditional sale, because although the mortgagor may not have strictly complied with the terms of the mortgage, still he has his right of redemption, while in the case of a sale the rights of the conditional purchaser are forfeited without a strict compliance with the terms of the sale. (*Matthews vs. Sheehan*, 69 N. Y. 590.) In *Conway's Executors vs. Alexander*, 6 Cranch. 236-7, Chief Justice Marshall, speaking for the Supreme Court of the United States, said, that as lenders of money frequently endeavor to obtain inequitable advantages over borrowers by taking security in this way "the leaning of the Courts has been against them, and doubtful cases have generally been decided to be mortgages." The same Court in a later case approved the rule thus stated. (*Russell vs. Southard*, 11 Howard, U. S. 151.) Other Courts, however, have acted upon a very different principle. Thus, in Illinois: "This Court has repeatedly said that when a sale is in form absolute, in order to change its character to that of a mortgage, the evidence must clearly show that it was so intended." (*Magnusson vs. Johnson*, 73 Ill. 159.) And in Nevada: "It is a well settled principle that the proof necessary to show a deed absolute upon its face to be a mortgage must be clear, convincing, and satisfactory. * * * Proof so cogent, weighty, and convincing as to leave no doubt upon the mind ought alone to overcome them." (*Pierce vs. Traver*, 13 Nev. 531.) Our own Supreme Court, in *Hoffer vs. Jones*, 29 Cal. 18, thus stated the rule: "A clear case ought to be made to justify a Court in finding upon parol testimony a deed absolute upon its face to be a mortgage." And in *Henley vs. Hotaling*, 41 Cal. 26, the same Court, by Rhodes, C. J., say; "When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject-matter, the parties, etc., but by evidence to establish an equity beyond and outside of the deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail." This expression "no doubt" was, of

course, intended to mean no *reasonable* doubt; for even in criminal cases the guilt of the defendant does not require proof beyond a doubt. In civil cases the rule usually requires a mere preponderance of the evidence. In no case should it require absolute certainty, for that is seldom possible.

From the foregoing decisions I understand the rule of evidence on this subject to be established, so far as this State is concerned, in terms that require something more than a mere preponderance of the evidence, as in ordinary cases: the mortgage must be proved beyond a reasonable doubt. The case of *Montgomery vs. Spect*, *supra*, was such a case. There the land was worth \$25,000, and the sum to be paid was only \$7,000; Spect remained in possession and exercised acts of ownership—making improvements, collecting rents, and selling portions of the land.

The evidence in this case is to be considered in the light of the foregoing decisions; and since the rule of evidence is one relating to questions of general jurisprudence, and not peculiarly within the jurisdiction of the Federal Courts, I must follow the decision of the Supreme Court of this State rather than that of the Supreme Court of the United States.

The deed is in evidence and speaks for itself. It is in the usual form of an absolute deed, containing nothing to indicate a loan or a mortgage. The instrument which was executed contemporaneously with it has been lost, and was not produced at the trial. It was delivered to the plaintiff and by him kept for some years in a bureau drawer in a room occupied by the plaintiff and defendant. Each contends that the other is at fault for the non-production of the paper. The testimony of a witness that he saw the paper in the possession of the defendant after the commencement of the suit, but did not examine it critically, is contradicted by the testimony of the defendant, who says it was the deed the witness saw. I am unable to say which of the parties, if either, is to blame for the absence of the document. Therefore I assume that it was not within the power of either to produce the instrument and shall not view the evidence of either with distrust on account of its absence. The only direct evidence as to the contents of the lost document is the testimony of the parties and of Judge Clark who, as attorney for defendant, was consulted with reference to the transaction, and says he wrote the instrument in accordance with the instructions of the defendant, the plaintiff being present and agreeing to its terms. His testimony is to the effect that the parties came to his office together, and one of them handed him the deed, when the defendant said: "I have bought this land of Mr. Wilson, but I do not care about the land; I am willing to reconvey it to him at any time within twelve months upon being paid the sum I paid (naming the sum), with interest at one per cent. per month." "She also said he was to have possession during the year; she had

land enough for her sheep and did not want the occupation of it that year; and she asked me to draw an agreement to that effect. Nothing was said about a debt or a mortgage. I drew the agreement accordingly and inserted the words, 'time is of the essence of this agreement.' No note was given." The defendant corroborates this testimony.

Taking this as a correct statement of the terms of the agreement, it would, in the absence of any evidence other than the deed, show a sale and not a mortgage, since there is nothing whatever in the transaction to indicate the making of a loan and taking security, except the fact that the purchase price with interest was to be the consideration of the reconveyance. Though this is sometimes an important circumstance to be considered with other facts, it is not of itself sufficient evidence of a debt. In *Henley vs. Hotaling*, *supra*, it appeared that S. F. Storms, as attorney in fact for William Storms, applied to Hotaling for a loan of \$5,000, offering to give a mortgage of certain land to secure the loan. Upon inspecting the power of attorney it was found insufficient to authorize the making of a mortgage though sufficient to authorize a sale. Thereupon the attorney made a deed of the land for the \$5,000, and took an agreement to reconvey one year from date upon payment of \$5,000 with interest. The Supreme Court held it was not a mortgage, saying: "We look in vain in this case to find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotaling."

The plaintiff in this case testifies that the agreement was, in effect, a simple defeasance, and he contends that the circumstances surrounding the parties, their conduct and admissions, show there was a debt—a loan—and therefore a mortgage.

When the parties intermarried several years ago, each had separate property. The defendant was a widow and had successfully managed an estate left her by her first husband. At the time of this transaction they were living together upon land belonging to defendant at Elk Grove in Sacramento County. Part of the defendant's property was money in bank and part consisted of sheep and other live stock. The plaintiff had purchased a tract of land in the neighborhood at four dollars per acre. It was part of a Mexican grant, the boundaries of which were unsettled and were in litigation. The tract was supposed to contain about 4000 acres, but there might be as much as 4300 or 4400 acres. A Mr. Pierce owned a tract containing 5000 acres situated nearer the residence of plaintiff. Desiring to obtain the Pierce tract, he sold the other parcel to one Mousch at six dollars per acre, the same price he was to pay Pierce. Subsequently Mousch, thinking the price was too high and finding his contract was not legally drawn, refused to take the land. Thereupon the plaintiff applied to Pierce to be released from his contract to purchase the 5000 acre tract because he was dependent

upon the sale to Mousch for the money with which to pay Pierce. The latter refused to release the plaintiff unless he would pay \$500, as compensation for the trouble caused by the bargain. The plaintiff informed the defendant of his embarrassment and after some unsuccessful negotiations with Pierce she agreed that if the plaintiff would sell a portion of the 4000 acre parcel she would advance \$7,000 for a year to enable him to save the \$500. demanded by Pierce. He sold four sections to Miles and Miller at six dollars per acre. There was a mortgage upon the whole tract to the Capital Savings Bank for about \$7,000, including interest. The plaintiff obtained the \$7,000 from the defendant, paid off the mortgage, conveyed to Miles and Miller the parcel sold to them, and executed to defendant the deed in suit purporting to convey "2000 acres more or less." It was thought at the time that the number of acres was about 2000, but their might be as much as 2200 or as little as 1500 or 1800 acres, according as the boundaries of the grant should be settled.

The plaintiff testified that this money was advanced as a loan, but the defendant demanded a deed instead of a mortgage because "she had had so much trouble with her other husband's people that she did not want my people to come on her and fuss with her in case I died, and she would give me a bond to make her redeem the land to her, when I paid her her \$7,000. So I took the money from her, and her and I came into town to fix the matter up, and I borrowed the money of her and gave her a deed and took a bond to redeem back again. But I only borrowed it for one year; we had the papers made up to pay it back to her in one year with one per cent. interest.

The plaintiff remained in possession of the land during the year, and at the end of that time he notified the defendant that he could not pay her the \$7,000 with interest, as he says; or, according to her statement, that he could not repurchase. Thereupon, in January, 1877, she took possession, moved her stock upon it, made some improvements and paid taxes as alleged in the answer. She has remained in possession ever since. The plaintiff admits, in his testimony, that he supposed the defendant became the owner of the property by his failure to pay the money within a year—"that the law gave it to her" as the result of the contract between them. He did not assert title in the property afterwards until shortly before the commencement of this suit, though he had often urged the defendant to allow him to redeem, and they quarreled and finally separated in consequence. A few weeks before this action was commenced, the boundaries of the grant having been settled, it was found that the tract formerly owned by the plaintiff contained 4400 acres instead of 4000 acres as had been supposed. The plaintiff had purchased from Judge Wm. H. Beaty, paying for 4000 acres only, and agreeing that if the tract should be found to contain more land he would pay for it at the same rate—four

dollars per acre. Demand was made upon him for the additional sum thus becoming due. He called at the law office of Messrs. Beaty in company with the defendant, and contended that she ought to pay the money as she owned the land. This was determined against him, but the conversion led the Messrs. Beaty to understand that the transaction of November 26, 1875, was a loan and mortgage and not a sale. They so advised the plaintiff and were employed by him to negotiate a settlement upon the basis of a redemption if possible without suit, otherwise to take necessary legal proceedings. Several conversations occurred between the parties relative to a settlement. Both the Messrs. Beaty testified at the second trial (the plaintiff having changed his attorneys after the first trial so as to have the benefit of this testimony) that the parties substantially agreed as to the facts in regard to the transaction of November 26, 1875; that the defendant had loaned the plaintiff the money for one year at one per cent. per month; that he gave her a deed, was to remain in possession during the year, pay back the \$7,000 with interest during the year and have it reconveyed to him; but he failed to make the payment and she took the land for the debt. The younger Judge Beaty says that when it was explained to her that she had only taken a mortgage and that the plaintiff had a right to redeem, "she could not believe that that was the law, and she restated the proposition herself: 'why he has given me an absolute deed to the land; I gave him an agreement to recover it if he paid me at the end of the year, and he did not pay me and I took possession of the land?' She seemed to think it was a very strange and wild proposition that under those circumstances there could be any right of redemption." At another interview the same witness says the defendant stated "she loaned the money to Mr. Wilson at a time when it was a great accommodation to him to have it, and she took possession of the land at a time it was very inconvenient to take it and put her sheep upon it, and the land had now increased in value and it turned out to be more land than there was thought to be originally, and she thought it was very hard and unjust, under the circumstances, for Wilson to claim to redeem. * * * She used the expression that she had loaned him the money as an accommodation." After several interviews she ceased to speak of the transaction as a loan and called it a sale.

A great many witnesses testified that at various times they had heard the defendant in casual conversation speak of the transaction as a loan. Two of them—Mr. and Mrs. Skaggs—had endeavored to effect a settlement between them. They say the transaction was admitted by defendant to have been a loan; or rather, that the negotiation for a settlement proceeded on the theory that the defendant had originally loaned the money upon the condition that it was to be repaid in one year, and if

not so paid the title to the land was to vest absolutely in the defendant. This was also the plaintiff's understanding, for he asked as a favor, and not as a right, to be allowed to repay the \$7,000 with interest, and take back the land. She always insisted upon the legal right to hold the land, as she had stipulated there should be no mortgage; but, as she says, to avoid litigation she offered to pay plaintiff \$5,000. Some of the testimony is to the effect that she said she "took the land on a forfeit"—implying that the plaintiff had forfeited the right of redemption.

On the other hand numerous witnesses testified that they had on different occasions heard the plaintiff say he had sold the land to his wife. Among these were Miles and Miller, who speak of such language having been used by him immediately before and after November 26, 1875.

The admissions of a party, though against his own interest, are to be received with great caution, because of the danger of mistake or misapprehension of witnesses, or the misuse of words in ordinary conversation, the want of care of the party to express himself exactly when talking of a matter to a stranger casually, etc. (1 Greenleaf Ev. Sec. 214.)

There was evidence tending to show that the land was worth six dollars an acre at the time of the contract of 1875. At that rate 2200 acres would be worth \$13,200 instead of \$7,000. Other witnesses put the price at three dollars and a half and four dollars per acre, and it was not known that there was more than 1500 or 1700 acres, at four dollars per acre, 1700 acres would be worth \$6,800. I think the evidence, though conflicting, shows the fair annual rental value of the land was about thirty-five cents per acre. Upon 2000 acres this would be \$700 a year—an income equal to ten per cent. upon \$7000. At this rate the land would not yield as much profit as the interest on the \$7,000 at twelve per cent., which was the current rate of interest at the time.

Gross inadequacy of price is a strong circumstance, though not always sufficient of itself to show that a mortgage and not a sale was intended, in cases of this class. Where the price was \$2,000, and the value of the property \$6,000, the circumstance of the case was considered important. (*Peugh vs. Davis*, 96 U. S. 328.) But in another case, where the value was uncertain and not greatly inadequate, the same Court, by Chief Justice Marshall, held that "the circumstance was not of sufficient weight to convert the deed into a mortgage." (*Conway's Executors vs. Alexander*, 7 Cranch, 241.) The facts that the land was subsequently found to be of greater quantity, and that it increased in price, are unimportant, unless as showing a motive in plaintiff for seeking to redeem. Defendant took possession before the rise in price and before the settlement of the

boundary line. I do not think the evidence as to the inadequacy of price is entitled to much weight.

Nor do I consider the evidence as to the distress of plaintiff for want of money very important. He had paid but four dollars per acre—something over \$8,000 for the land in suit. He was selling for about \$7,700—one year's use of the land and \$7,000 in money. The sale enabled him to make a profit of \$4,000 upon the sale to Miles and Miller, and also to retain the Pierce tract of 5000 acres, besides saving the \$500 Pierce demanded for releasing him; and the Pierce tract was shown to be more valuable than the one he sold—probably to the extent of two dollars per acre. Under these circumstances, it is not strange the defendant thought she was accommodating him, nor that he should have consented to her terms that there should be no mortgage. In *Conway's Executors vs. Alexander*, already referred to, it appeared that Alexander, while in jail for debt in Virginia, sent several times to one Lyles urging him to buy a parcel of land adjoining the land of Lyles, his object being to get money with which to pay the debt for which he was imprisoned and thus regain his liberty. Lyles wanted 20 acres of the land and no more, but finally purchased the 20 acres absolutely, and the residue of 400 acres "was purchased conditionally to suit Alexander. Lyles was determined to advance no money on any bargain which should make it necessary to go into Court to get it back." The conveyance was made March 27, 1788, the purchase price was to be repaid to Lyles July 1, 1790, when the title should be reconveyed to Alexander, or in default thereof the title should pass to Lyles absolutely. The money was not paid and the Court say that though "he was in jail and was much pressed for a sum of money," "this circumstance does not deprive a man of the right to dispose of his property." (Id. p. 240.)

There are some circumstances which tend to show the transaction was a loan and not a sale. There was no negotiation by defendant for the purchase of the land; she did not even inquire into the real value of the property though she knew its value generally; she admits she did not want it, but took it as an accommodation to plaintiff. The sum to be paid by plaintiff within the year, was the same with interest as the sum advanced by defendant. On the other hand, it is admitted by plaintiff that the defendant refused to take a mortgage, and expressly stipulated before advancing the money, that there should be no mortgage; the plaintiff does not say that he demurred to this, and there is very strong evidence that he acquiesced in it. It is certain that he signed a deed absolute in form, and did not sign any note or other document that obligated him to repay the money.

The evidence as to the admissions greatly preponderates in the proof of two facts inconsistent with each other: (1) that the plaintiff admitted he had sold the land to defendant, and (2)

that the defendant admitted she had loaned the money to plaintiff. The only way I can reconcile this evidence, is upon the theory that the parties used language without intending the significance sought to be given it at the trial.

There is one fact, however, that to my mind is entitled to very great weight, *the defendant did not intend to take a mortgage.* That is clear. No doubt she so instructed her attorney—that is, she directed him to put the transaction in the shape of a sale by preparing an agreement to reconvey to accompany the deed, and that her object was to avoid the trouble and cost of possible litigation, which might result from a mortgage. He says she had a deed and merely wanted to give her husband the privilege of repurchasing within a certain time. If I should construe the contract to be one of mortgage, I should certainly be making a contract different from the one they intended. Such is not the province of the Courts. Other strong facts against the plaintiff are the fact that he did not at any time offer a mortgage, nor object to the deed, nor assert any title after the end of the year, but voluntarily surrendered possession with the understanding that the land was hers by the terms of the contract of November 26, 1875. The conduct of both parties is inconsistent with the theory of a continuing debt. She never demanded payment, and he did not assert the right to redeem until advised by counsel.

In view, therefore, of all the evidence, and of the rule laid down by the Supreme Court that, in this class of cases, it must appear beyond a reasonable doubt that a mortgage was intended, I cannot decide in favor of the plaintiff. I will say, however, that if I felt at liberty to relax the rule in any case I would do so in this, because of the relations of the parties as husband and wife. The defendant could not be injured in any way, as she would get back her money with a high rate of interest, while the plaintiff would be restored to an estate which his temporary financial embarrassment compelled him to alienate. Our laws make no distinction between husband and wife when dealing with each other as to their separate property, but an appeal by one member of the community for relief from the exactions of the other member who is stubbornly insisting on hard legal rights cannot be refused by a Court of equity without great reluctance.

I am of opinion that the plaintiff has failed to establish the fact that the instruments executed November 26, 1875, constitute a mortgage. Judgment must be rendered dismissing the complaint.

October 5th, 1882.

Henry Edgerton and Grove L. Johnson, for plaintiff.

A. C. Freeman, Bates, and Attorney-General Hart, for defendant.

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No. 10.

Supreme Court of California.

IN BANK.

[Filed October 10, 1882.]

No. 7051.

VICTOR SEWING MACHINE COMPANY, APPELLANT,
VS.
SCHEFFLER, RESPONDENT.

CONTRACT—SURETY—BOND—PLEADING—ACTION—SEWING MACHINES. Action against defendant as security upon a bond executed by one Lonsdale, to secure the performance of an agreement between plaintiff and said Lonsdale, as plaintiff's agent for the sale of sewing machines. Plaintiff counted upon non-performance of the conditions of such contract, while the evidence showed a change of such contract without the consent of defendant. *Held*, the findings to that effect are sustained by the evidence. They are not necessarily findings upon *res novae* matter, which should be alleged in the answer. The general denial puts in issue the alleged breaches of the original contract between plaintiff and Lonsdale. Proof of the fact by plaintiff that a new contract had been substituted for the old one, established that plaintiff was not entitled to recover for a non-performance of the conditions of the old.

Id.—Id. If plaintiff had set forth in its complaint the contract with Lonsdale, as modified (and counted upon non-performance thereof by Lonsdale) it could not have recovered, because the bond executed by defendant did not provide that the liability of defendant should continue, notwithstanding such a modification of the contract as was in fact made.

Id.—Id. Having set forth the original contract (and counted upon its non-performance by Lonsdale), and proved that the original contract had been changed in such manner as to release defendant from his obligations, plaintiff was not entitled to recover in the present action.

Id.—Id. Even if the change in the terms of the original contract were held not to be such as to release defendant, the plaintiff would not be entitled to recover upon allegations that Lonsdale had not performed the conditions by him to be performed under the original contract, since plaintiff proved that the original contract had ceased to be in force prior to alleged non-performance of its conditions by Lonsdale.

Appeal from Fifteenth District Court, San Francisco.

Texas Angel, for appellant.

C. E. Rodgers, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action was brought against defendant as security upon a bond executed by one Lonsdale, to secure the performance of an agreement between plaintiff and said Lonsdale as plaintiff's agent at Peoria, Illinois, for the sale of sewing machines. By the agreement plaintiff was to ship to Chicago, six of its sewing machines, marked to consignee at Peoria, and as often as an account of sales should be rendered by consignee to consignor, together with the full proceeds of said sales (except as otherwise provided) the consignor, plaintiff, on the request of consignee to ship to his order as many machines as should be reported sold and accounted for, provided, however, that the consignee should never at any one time have on consignment more than six machines. That the consignee should open a salesroom at Peoria and devote his time to the introduction of the "Victor" machine. All machines to be sold for cash, or promissory notes guaranteed by the consignee, etc. That consignee should sell and account for all machines within four months from the date of shipment, and upon failure to sell and account to said consignor, the latter at its option, at any time after date of shipment, might charge the consignee with all machines consigned four months, not satisfactorily accounted for, at the retail price of said machines, less 40 per cent., and such amounts should be immediately due on demand.

The bond sued on provides that the contract or agreement above in part recited, and therein described, "may be varied or modified by the mutual agreement of said sewing machine company and said Samuel G. Lonsdale, as to the manner of carrying on said business, or as to the compensation to be paid the said Samuel G. Lonsdale, or as to the period of which said Samuel G. Lonsdale shall report to and pay said company for the machines he may sell, or as to the territory on which said machines shall be shipped or sold, and such changes or modifications or variations shall in no wise affect or impair our liability on this bond."

A copy of the agreement between plaintiff and Lonsdale is annexed to the complaint, and the breaches of such agreement on the part of Lonsdale, as alleged, are: "That on the 31st of March, 1877, the said Samuel G. Lonsdale was indebted to this plaintiff in the sum of two hundred and sixty-seven dollars for certain Victor sewing machines which had

been from time to time consigned to said Samuel G. Lonsdale by said plaintiffs, *under said contract*, which had been consigned as aforesaid more than four months from the date of consignment, and had been sold by said Samuel G. Lonsdale, but had not been satisfactorily accounted for or paid for by him, and thereupon on said last mentioned day this plaintiff, *under* and by virtue of the provisions of *said contract in that behalf*, charged said Samuel G. Lonsdale with the retail price of said Victor sewing machines, less forty per cent., to wit, the sum of \$267 aforesaid. And thereupon this plaintiff duly demanded payment of said sum, etc., which payment was refused."

"And this plaintiff further alleges that on the 22d day of May, 1877, the said Samuel G. Lonsdale was further indebted to this plaintiff in the sum of \$135 for certain other Victor sewing machines," etc. (Proceedings in all respects as in the averment of the breach above recited.)

There is no averment that the agreement annexed to the complaint was ever altered in any particular.

The case shows that, without the consent of defendant, the contract between plaintiff and Lonsdale was changed and modified so as to permit the consignment of more than six machines, and provide that Lonsdale might have more than six at the same time. The clause in the bond which continues the liability of sureties notwithstanding a change in the contract between their principal and plaintiff "as to the manner of carrying on said business," etc., did not continue the liability of the sureties in case of a change in any other respect. The change by which Lonsdale was to have more than six machines, was not authorized by the clause permitting a change "as to the manner of carrying on said business," and it is not pretended that it is covered by any other of the changes spoken of in the bond.

When plaintiff proved the important change in the contract between it and Lonsdale which released the sureties of the latter, it proved itself out of Court. It may be admitted defendant was bound to respond for any damages sustained by plaintiff by reason of Lonsdale's failure to perform his original contract or his contract as modified in any of the particulars mentioned in the bond. But plaintiff showed that Lonsdale was not responsible for any breaches of the contract set forth in the complaint by showing that such contract was not in force when he was alleged to have broken it. In other words, the evidence failed to sustain the averments of the complaint.

The Court below found: "After the execution of said con-

tract and bond, transactions to a considerable amount took place during a long period of time, between said Lonsdale and the corporation, plaintiff, resulting in a loss to said corporation, but such transactions were more extensive and involved greater liability than those contemplated in said contract and bond." "That said defendant never received any notice, nor ever consented to any modification of said contract."

These findings are amply supported by the evidence. They are not necessarily findings upon *new matter*, which should be alleged in the answer. The general denial puts in issue the alleged breaches of the original contract between plaintiff and Lonsdale. Proof of the fact by plaintiff that a new contract had been substituted for the old one, established that plaintiff was not entitled to recover for a non-performance of the conditions of the old. The finding that the transactions were such as were not contemplated by the terms of the written agreement or bond, is a finding that an oral agreement, express or implied, had been substituted by the parties, or that the original had been materially altered with their consent.

It necessarily follows that plaintiff cannot recover damages for non-performance by Lonsdale of the conditions of the original agreement, upon which, and the non-performance by Lonsdale of the conditions of which, plaintiff alone counts in his complaint.

Even if it should be admitted that the change in the contract between plaintiff and Lonsdale was one contemplated by the wording of the bond, plaintiff could not recover upon allegations of the terms of the original contract, and of non-performance of its conditions by Lonsdale. His complaint should have set forth the substituted agreement and breach of its conditions. He should rest upon the liability of defendant arising from the failure of Lonsdale to perform the substituted or modified agreement. The view we have taken of the case renders the failure of the Court below to find upon the issue as to the release of defendant's co-surety entirely immaterial.

1. If plaintiff had set forth in its complaint the contract with Lonsdale, as modified (and counted upon non-performance thereof by Lonsdale), it could not have recovered, because the bond executed by defendant did not provide that the liability of defendant should continue, notwithstanding *such* a modification of the contract, as was in fact made.

2. Having set forth the original contract (and counted upon its non-performance by Lonsdale) and proved that

the original contract had been changed in such manner as to release defendant from his obligation, plaintiff was not entitled to recover in the present action.

3. Even if the change in the terms of the original contract were held not to be such as to release defendant, the plaintiff would not be entitled to recover upon allegations that Lonsdale had not performed the conditions by him to be performed under the original contract, since plaintiff proved that the original contract had ceased to be in force prior to the alleged non-performance of its conditions by Lonsdale.

Judgment and order affirmed.

We concur: Ross, J., Morrison, C. J., Sharpstein, J., Myrick, J., Thornton, J.

IN BANK.

[Filed October 10, 1882.]

No. 6861.

BRICKELL, RESPONDENT,
VS.
BATCHELDER ET AL., APPELLANTS.

MORTGAGE—DEPARTMENT—BANK. Opinion of Court in bank (9 Pac. C. L. J. 515.) adhered to on rehearing (McKinstry, J., Ross, J., and McKee, J., dissenting.)

Appeal from Twenty-third District Court, San Francisco.

Heydenfeldt, Jr., Newman, Heydenfeldt, and Patterson, for appellants.

Moore & Moore, for respondent.

By the COURT (McKinstry, J., McKee, J., and Ross J., dissenting):

This case was heard before Department One of this Court and its opinion filed June 24, 1881, (7 Pac. C. L. J. 733.) Subsequently, a hearing before the Court in bank was granted. Such hearing having been had, an opinion by the Court in bank was filed May, 30, 1882, (9 Id. 515.) Thereafter a rehearing in bank was granted. Such rehearing has been had. We are satisfied with the views expressed in the opinion of the Court in bank; and for the reasons therein given the Court makes the same order and gives the same judgment as therein contained.

IN BANK.

[Filed October 11, 1882.]

No. 10,765.

PEOPLE, RESPONDENT, VS. ROLFE, APPELLANT.

CRIMINAL PRACTICE — TESTIMONY — OBJECTION — MOTION — ROBBERY — EVIDENCE. Where testimony is admitted without objection or exception, a motion to strike it out should not be allowed.

ID.—ID. But the testimony sought to be stricken out was competent to prove the issues of the case. It consisted of circumstances more or less direct, tending to connect defendant with the perpetration of the robbery charged, and to establish his guilt.

ID.—IDENTITY. The testimony was sufficiently certain respecting the identity of defendant to go to the jury, and it was for them to say what weight it was entitled to.

ID.—PRIOR CONVICTION—CERTIFIED COPY. As to objection that the Court erred in admitting the certified copy of a prior conviction of defendant of another offense, under the name of "Frank Rollins," *Held*, the testimony shows that defendant was the same person convicted under such name.

ID.—ID.—ASSAULT—IMPEACHMENT. As to objection to the question: "Were you convicted of an assault with intent to kill, in San Mateo County, and if so when?" *Held*, unnecessary to decide whether the question was proper or not. Defendant became a witness on his own behalf, and the question was allowable for the purpose of impeaching his credibility as a witness in the case. *Further*: The fact that defendant was so convicted was established by a certified copy of the record of conviction, as well as by other evidence, and if error was committed in allowing the question, it was not prejudicial to defendant. (See *People vs. Chin Mook Sow*, 51 Cal. 600.)

ID.—ACCOMPLICE. There was sufficient testimony in corroboration of the accomplice to justify a conviction.

Appeal from Superior Court, Tuolumne County.

Dorsey and Nichols, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was convicted in the Superior Court of Tuolumne County of the crime of robbery, charged to have been perpetrated on the third day of February, 1882. The evidence shows that a stage driven, by one Dennis Shinn, was stopped near a point called Mountain Pass in said county, by two highwaymen wearing masks, and was robbed of several hundred dollars in gold and silver coin, the same then and there being the property of Wells, Fargo & Co. On the trial of the case, numerous exceptions to the rulings of the Court were taken by the defendant, all of which are now presented to this Court for review, and we will examine them in the order of their presentation.

First—It is claimed that the Court erred in denying de-

fendant's motion to strike out the evidence of the witnesses Collins, Fields, and others. It is a sufficient answer to this point, that all of the evidence which the Court refused to strike out, came in without objection or exception; and this Court has several times held, that in such a case a motion to strike out should not be allowed. The rule has been laid down in both civil and criminal cases. *Goodale vs. West*, 5 Cal. 339, is an early civil case to that effect, and *People vs. Long*, 43 Id. 444, is a late criminal case announcing the same rule. Wallace, C. J., there says: "The practice, whether in civil or criminal cases, or deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated." A party is not permitted to remain silent when evidence is offered, with the privilege of accepting it if favorable, and afterwards moving to strike it out if it is against him, but he must exercise his right of objection at a proper and reasonable time.

We have stated the rule as it has been laid down in this State, but it is proper for us to remark that the evidence was competent to prove the issues in the case. It all consisted of circumstances more or less direct, tending to connect the defendant with the perpetration of the robbery, and to establish his guilt. Evidence that he was seen at different places not far distant from the robbery, and on days not remote from the day on which the crime was committed, that he was seen in company with Hampton, the accomplice, who was used as a witness on behalf of the State, that they were armed, one with a rifle and pistol and the other with a shot gun, that they had the same dog with them, that they stopped at certain houses, procured meals there, and walked off in certain directions, that they made various inquiries, and otherwise conducted themselves in a suspicious manner, were all circumstances in the case, which were properly submitted to the jury, and the evidence respecting them should have been admitted by the Court, even if regularly objected to by the defendant at the proper time.

The objection that the witnesses did not positively, and beyond a doubt, identify the defendant, cannot be sustained. They expressed *the belief* that he was the person they had seen, and although their evidence was given with great caution, it was sufficiently certain respecting the identity of the defendant to go to the jury, and it was for the jury to say what weight it was entitled to.

Second—What we have said above is sufficient to dispose

of the other points made in the brief filed on behalf of the defendant, down to the objection that the Court erred in admitting the certified copy of a prior conviction of the defendant, of the crime of assault with intent to kill, in the late County Court of San Mateo County. It is claimed that there was not sufficient evidence to show that the defendant, Frank H. Rolfe, was the same party convicted in San Mateo County, under the name of "Frank Rollins;" but we think that the evidence very clearly shows that he was. The witness Charles Aull, testified that he was an officer in the State Prison at San Quentin from the year 1877, to the latter part of 1881, that during the whole of that period the defendant was an inmate of the prison, and was known by the name of Frank Rollins among the officers, as well as upon the records of that institution. Identity of person is presumed from identity of name. (C. C. P. 1963.) There were other circumstances in the case which tended to establish the fact that Frank H. Rolfe was the same person convicted in the County Court of San Mateo County under the name of Frank Rollins; but what we have already said on this point is sufficient.

Third—Objection is made that the Court erred in allowing the following question: "Were you convicted of an assault with intent to kill in San Mateo County; if so when?" It is unnecessary to decide whether the above question was a proper one or not. The defendant became a witness on his own behalf, and the Court allowed the question for the purpose of impeaching his credibility as a witness in the case. But it is sufficient for us to say that the fact that he was convicted in the County Court of San Mateo County of an assault with intent to kill was proved by a certified copy of the record, as well as by the evidence of the witness Aull, referred to above in this opinion, and there was no evidence to the contrary. But on this point, see *People vs. Chin Mook Sow*, 51 Cal. 600. If, therefore, the Court erred in admitting the question objected to, it was an error which, in no manner, prejudiced the defendant, and is not ground of reversal, as has been held by this Court in numerous cases.

In our opinion there was sufficient evidence in corroboration of the testimony of the accomplice to justify a conviction, and the Court properly denied the defendant's motion for a new trial.

Judgment and order affirmed.

We concur: Thornton, J., Sharpstein, J., Myrick, J.

We concur in the judgment: Ross, J., McKinstry, J., McKee, J.

IN BANK.

[Filed October 10, 1882.]

No. 7684.

COX, RESPONDENT, vs. McLAUGHLIN, APPELLANT.

CONTRACT—INTERPRETATION—PAROL EVIDENCE. Parol evidence of surrounding circumstances may be given to aid in the proper interpretation of an instrument; but, where the parties have themselves used words which require no interpretation—where the words are understood—there is no occasion for aid to their proper interpretation or meaning.

ID.—INSTALMENTS—CONDITION PRECEDENT. The parties did not agree by parol that payment of instalments should be conditions precedent; the most that can be said is, that the contractors in their own minds relied upon the payments to furnish means for prosecuting the work, and that defendant knew it. The Court below erroneously held this knowledge of a condition of mind to be a part of the contract.

ID.—PROFILES—ESTIMATES. The complaint as amended was for the value of work and labor done and materials furnished. The evidence as to the amount of work and labor was estimates based on profiles. By the terms of the contract, the amounts and quantities as shown on the profiles were to be the standard in either of three instances, neither of which occurred.

ID.—QUANTUM MERUIT—CONTRACT PRICE. Plaintiff doubtless had the right when the defendants ceased the payments, to consider the contract at an end, stop work and recover the value of the work then performed, and in such cases the contract price may be given in evidence to aid in arriving at the actual value; but in this case, where the work was only partially performed, the profiles would not show what amount had been performed. The Court below seems to have entirely ignored the *quantum meruit* theory, upon which the complaint is in fact based, and to have found the facts and rendered judgment upon the basis of the contract.

NOTE. The contract in question was before the Supreme Court heretofore, and the decisions thereon are reported in 44 Cal. 18; 47 id. 87; 52 id. 590; and 54 id. 605. This appeal is from the judgment and order of the Court below in favor of plaintiff, upon his amended complaint declaring for the value of the work and labor done and materials furnished.

Appeal from Superior Court, Alameda County.

Wilson & Wilson, Wise, Sanderson, Rhodes & Burstow, and Fox & Kellogg, for appellant.

McAllister & Bergin, Cobb, and Hoge, for respondent.

MYRICK, J., delivered the opinion of the Court (Sharpstein, J., and McKee, J., dissenting):

First. When this case was here on a former appeal this

Court held (54 Cal. 605) that when an entire contract is *terminated* by the employer, against the will of the contractor, the latter is not confined to the actual value of the work done, but may prosecute his action for the breach of the agreement, and may recover, as damages, the profits he would have made had he been allowed to complete the work; that the contract is thus terminated where the employer prevents or prohibits the completion of the work—the contractor being ready and willing to perform; but a mere failure to pay money due upon the contract, before the completion of the work, does not constitute such a prevention. And it was held in the same case (52 Cal. 590,) that, unless prevention was proved and found, the plaintiffs were not entitled, as the complaint then stood, to recover anything on the *contract*. On a prior appeal it had been held (47 Cal. 87) that the averment that the plaintiffs were prevented from completing the contract, was sufficient when tested by a general demurrer.

After the decision by this Court on the last appeal (54 and 52 Cal. *supra*,) the case went back for a new trial, and after some amendments to the complaint came on for hearing. The averments of the complaint, as to prevention, are "that said Cox & Arnold [predecessors in interest of plaintiff] were prevented from completing at all, and from completing the same within the time prescribed by said agreement, the said twenty-first mile, by the said The Western Pacific Railroad Company and said Charles McLaughlin, defendant," and "that said Cox & Arnold and this plaintiff were prevented from completing the said twenty miles of said railroad, as also the said twenty-first mile, and the remaining fifty-three and one-quarter miles to the said city of Stockton, within the time prescribed in said agreement, by the Western Pacific Railroad Company, and the said Charles McLaughlin, defendant."

These averments as to prevention had been [47 Cal. 87,] held good when tested by a general demurrer. It therefore became important for the plaintiff to prove acts constituting prevention other than mere non-payment. This was attempted to be done by evidence of non-payment of instalments, and by evidence that both parties knew at the time of making the contract and of the performance of the work that the contractors relied, and were compelled by their pecuniary resources to rely, upon the payment by the defendant of the instalments. Upon this evidence the Court below remarked in its opinion:

"This concurrent evidence of both plaintiff and defend-

ant satisfies me that defendant knew at the time the contract was entered into, that plaintiffs did rely entirely on his payments to them, and such reliance was an inducement to the contract on their part; and so from this evidence above quoted, and from other evidence and circumstances proved, I shall find the facts so to be.

"This fact was neither proved nor found upon the last trial. Had it been so found, we are bound to believe that the judgment would not have been reversed, because then the conditions and stipulations of the contract would have been interpreted and held to be dependent, the breach of any material one of which would have entitled either party, as against the other, to sustain an action for the breach, or, in this case would have entitled the plaintiffs to abandon the work and sue upon the contract, and recover for the agreed price of the work done and materials furnished, as well as for damages in respect to what could have been made had the defendant kept the contract on his part. Nor is the evidence now given upon this subject amenable to the objection that it is adding to the terms or conditions of the contract by verbal or parol evidence. It is always permissible to show the facts, conditions, and circumstances surrounding the parties at the time a contract is made, with a view to its interpretation and meaning."

The rule suggested by the Court as to the admissibility of parol evidence to aid in the interpretation, or in discovering the meaning of a contract is amply sustained by authority, and is very clearly announced in Section 1860, C. C. P.: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

In the application, however, of this well-known rule to the case under consideration, the Court below has fallen into an error. Parol evidence of surrounding circumstances *may* be given to *aid* in the proper interpretations of an instrument, but where the parties have themselves used words which require no interpretation—where the words are understood—there is no occasion for aid to their proper interpretation or meaning. In this case the parties had, by their contract, clearly expressed two ideas or agreements: First—That the contractors were to perform certain work. Second—That the defendant was to make payments therefor in instalments. The words as to these agreements are of very plain significance. This Court had decided that non-payment of instal-

ments was not prevention; therefore, by the terms of the contract, payment was not a condition precedent. In order to make payment a condition precedent, a clause would have to be inserted, interjected into the contract, which the parties themselves did not see fit to place there. It is not in evidence that the parties agreed, by parol, that the payments should be conditions precedent; but even if they had so agreed, the well known rule would apply that their final conclusions were as they have expressed them in writing. The Court below says: "On this trial it was proved by the evidence of both plaintiff and defendant, that the defendant did know at the time the contract was entered into, that plaintiff relied entirely on his payments to them." If the defendant knew this as a fact, the plaintiff must also have known it, and it was then a very easy matter for him to have required it to have been expressed in the contract. He now insists that this Court shall inject into the contract a provision which he saw fit to omit. As we said above, the parties did not agree by parol that the payment of the instalments should be conditions precedent; the most that can be said is, that the contractors in their own minds relied upon the payments to furnish means for prosecuting the work, and that the defendant *knew* it. Thus this knowledge of a condition of mind was held by the Court below to be a part of the contract, or to control action as if a clause had been inserted. We have not been referred to any authorities sustaining the proposition. All the authorities relating to the admissibility of parol evidence relate to instances where the terms of the writing require interpretation—not where the evidence would add a new provision or obligation. We again refer to the case of *Pulm vs. O. and M. R. Co.*, 18 Ill. 219, a quotation from the opinion being found in the opinion of this Court, 54 Cal. *supra*, viz. "Can we inquire into the actual fact, and see whether the non-payment did really stop the plaintiff or not, and thus administer one measure of law to the poor man and another to the rich?"

Second—The complaint was so amended as to declare for value of the work and labor done and materials furnished. The evidence as to the amount of work and labor was estimates based on the profiles. By the terms of the contract, as amended by the agreement of October 2, 1865, the amounts and quantities as shown on the profiles were to be the standard in either of three instances, viz.: If the contract should be annulled by mutual consent; if the work should be entirely suspended by direction of McLaughlin; or, upon the full completion of the contract. The case pre-

mented to us is in neither of these three conditions. The contract was not annulled by mutual consent; the work was not entirely suspended by direction of McLaughlin; nor was the contract completed. It is true the Court below found that McLaughlin had entirely suspended the work; but this finding is not sustained by the evidence. The evidence is that McLaughlin directed the diminution of the laboring force to but a few men. This he had a right to do according to the express terms of the contract. (54 Cal. 605, above cited.) The Court, in arriving at its conclusion as to the amount of work done, says: "In arriving at my conclusion as to the amount and value of work done and materials furnished, I have taken the profile estimates, and laid the testimony of the engineer, Strangroom, as to the estimates made by him, entirely aside, for the reason that his estimates did not only not follow, or profess to follow, the profile, but professed to state the work actually done, and even to this extent were not made, except in part (and what part does not appear,) from actual measurement, but from notes, memoranda, and loose papers in the office of McLaughlin, that, he says, it would be hard to make head or tail of. I think that plaintiff is entitled to the profile estimates for two reasons: First, because the supplemental contract so provided in case defendant entirely suspended the work, which, as we find, he did do, and, Second, because the profile estimates, as shown by the evidence, and as I shall find, represent the real and fair value of the work."

The plaintiff, doubtless, had the right, when the defendant ceased the payments, to consider the contract at an end, stop work, and recover the value of the work then performed—and, in such cases, the contract price may be given in evidence to aid in arriving at the actual value; but where the work is only partially performed, the profiles would not show what amount had been performed. The Court below seems to have entirely ignored the *quantum meruit* theory, upon which the complaint is in fact based, and to have found the facts and rendered the judgment upon the basis of the contract. Such cannot be done in the case as presented by the plaintiff.

Judgment and order reversed and cause remanded for a new trial.

We concur: Morrison, C. J., Ross, J., McKinstry, J. Thornton, J.

We dissent: Sharpstein, J., McKee, J.

IN BANK.

[Filed October 9, 1882.]

No. 7712.

MULREIN, RESPONDENT,

VS.

KALLOCH ET AL., APPELLANTS.

CITY HALL COMMISSIONERS—CONTRACT—LATHING—SPECIFICATIONS—SAN FRANCISCO—ADVERTISEMENT. Appeal from injunction orders. Defendants, Commissioners of the New City Hall, San Francisco (Stats. 1875-6, p. 461), caused to be published an invitation for proposals for furnishing materials and doing work upon the Hall. The notice declared that the work was to be performed and the materials supplied in accordance with contract and specifications mentioned. *Held*, the contract and award thereof was not void, because among the specifications was one calling for lathing cut out and manufactured from sheet-iron in San Francisco.

Id.—Id.—The Act contemplates the preparation of specifications before publication of the notice for bids. "The advertisement " " " may refer to plans and specifications," etc. (Section 14.) If the Commissioners had power to adopt the specification, there is no question but the notice for bids was in proper form, and was published as required by Section 14.

Id.—Id. It was determined by the Commissioners that *lathing* cut out and manufactured from sheet-iron in San Francisco was better adapted to the purpose they had in view than lathing made elsewhere.

Id.—Id. If the Court could substitute its judgment for the Commissioners, there is no evidence tending to prove that they were mistaken. Judicial notice would not be taken that the fact is not as found by the Commissioners.

Appeal from Superior Court, San Francisco.

Baggett, Cope & Boyd, and *McAllister & Bergin*, for appellants.

Miller and Langhorne, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

Defendants, "Commissioners of the New City Hall," caused to be published an invitation for proposals for furnishing materials and doing certain work upon the Hall. The notice declared that the work was to be performed and the materials supplied in accordance with contract and specifications mentioned.

The question is: Was the contract and the award thereof to Carter void, because among the specifications was one which reads.

"The lathing used must be either Carter's patent lathing

of the same construction as that previously used on the building, and which must be cut out and manufactured from the sheet-iron within the limits of the city and county of San Francisco, or it must be some other description of lathing, also to be cut out and manufactured from the sheet-iron within the limits of the city and county of San Francisco, of equal quality and merit to the lathing above specified, and to be approved as such by the Commissioners and the Architect and the Superintendent."

The Act contemplates the preparation of specifications before publication of the notice for bids. "The advertisement * * * may refer to plans and specifications," etc. (Stats. 1865-66, p. 464, Sec. 14.)

If the Commissioners had power to adopt the specification, there is no question but the notice for bids was in proper form, and was published as required by Section 14.

It was determined by the Commissioners that *lathing*, cut out and manufactured from sheet-iron in San Francisco, was better adapted to the purpose they had in view than lathing made elsewhere. Even if we could substitute our judgment for theirs, there is no evidence in the transcript tending to prove that they were mistaken. We cannot take judicial notice that the fact is not as found by the Commissioners.

Orders reversed.

We concur: Myrick, J., Sharpstein, J., Ross, J., Morrison, O. J., McKee, J., Thornton, J.

IN BANK.

[Filed October 9, 1882.]

No. 8207.

HALL, APPELLANT, VS. THEISEN, RESPONDENT.

~~Tax Deed~~—CERTIFICATE—CLOUD ON TITLE—CASE FOLLOWED. *Hall vs. Theisen*, 7347, followed.

Appeal from Superior Court, El Dorado County.

Smoot and *Miller*, for appellant.

Jarboe & Harrison and *O'Brien*, for respondent.

By the COURT:

This appeal is from the judgment. The case No. 7347 is an appeal from the order dissolving the injunction. We have this day filed an opinion in the latter appeal. For the reasons given in that opinion, the judgment here appealed from is affirmed.

DEPARTMENT No. 1.

[Filed October 12, 1882.]

No. 10,744.

PEOPLE, RESPONDENT, vs. COCHRAN, APPELLANT.

CHALLENGE—JURORS—CRIMINAL LAW—EXCEPTION. *Per McKee, J.:* 1. The District Attorney, in the examination of jurors, challenged a juror named Craig, upon the ground that he had not been in the country for the past ninety days, and the Court allowed the challenge, to which ruling the defendant excepted. *Held*, assuming that the juror was competent, and that the Court erred in allowing the challenge, the action of the Court is not reviewable here, because there was no denial of the facts alleged as ground of the challenge taken by the District Attorney, and no exception was interposed by the defendant to the challenge (Sections 1077, 1061, 1062, Penal Code); therefore the decision of the Court, in allowing the challenge, did not constitute the subject of an exception (Sec. 1170, *supra*); and, under such circumstances, the decision is not open to review.

Id. Per McKinstry J., Ross, J., concurring: The juror Craig was not challenged on the ground "that he had been absent from Kern County for ninety days," as stated by appellant. "The evidence tended to prove, and the Court below found it did prove, he had not been a resident of the county "for ninety days before being selected and returned." (C. C. P., 198; P. C., 1072.)

NEWSPAPERS—OPINION—BIAS. *Per McKee, J.:* 2. No error in disallowing the challenge taken to the juror Hayden, on the ground that he had formed an unqualified opinion, because the opinion which the juror had formed or expressed, was founded upon what he had read in the newspapers, and he testified that he could, notwithstanding the opinion, act impartially and fairly upon the matters which were to be submitted to him. The opinion was therefore of such a character as did not disqualify him. (Secs. 1074, 1076, Penal Code.) Besides, in challenging the juror, the defendant did not state the specific grounds upon which the challenge was taken.

Id. Per McKinstry, J., Ross, J., concurring: As to defendant's challenge to the juror Hayden, the "having formed an unqualified opinion" is no longer a cause of challenge for "implied bias." (P. C., 1074.) It does not of itself constitute cause of challenge for "actual bias." The fact that a juror has formed or expressed such opinion may be proved as tending to establish "the state of mind" of the juror. (P. C., 1073, sub. 1.) But it is the duty of the trial Court to find against the challenge for actual bias, when supported by evidence of an unqualified opinion, if satisfied that the juror's opinion is founded "upon common rumor," etc., and that, notwithstanding his opinion, he can and will "act impartially and fairly upon the matters submitted to him." (P. C., 1076.) There is no way in which the finding of the trial Court upon the issue of fact—the presence or absence of actual bias—can be reviewed here. (P. C., 1170.)

Id.—INSTRUCTION. *Per McKee, J.:* 3. A Court is not bound to repeat itself at the request of counsel. After it has already given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may well be refused.

HOMICIDE—SELF-DEFENSE. The Court modified an instruction so as to read: "Homicide is justifiable when committed in defense of person against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to do some great bodily injury upon any person." *Held*, the right of self-defense does not depend upon the manner in which an assault may be made, nor can it be limited to a mere right of resistance to a design and danger, which arises out of circumstances of tumult and riot. If a person, in the circumstances in which he may be placed, has reasonable grounds to apprehend a design on his life or to do him some great bodily injury, and there be imminent danger that it may be accomplished, the right of self-defense arises, and may be exercised even to the taking of life, whether the design be manifested and the danger impend noiselessly, or in a riotous and tumultuous manner. A design to commit a felony is not always accompanied by riot and tumult, nor is the imminency of danger always measureable by the noise which it makes.

Id.—Id. But whether the instruction in its restrictive sense was correct, or misleading, and, therefore, erroneous, is of no practical moment in the case, because there was no evidence tending to show that the deceased had assailed the defendant in a riotous or tumultuous manner, or otherwise; or that the defendant had any grounds, reasonable or otherwise, to apprehend danger from the deceased. On the contrary the evidence showed that, on the day of the homicide, a mob had riotously assembled, for the purpose of breaking into the jail at Kern County, to take out a prisoner and hang him, and that the defendant, as one of the mob, while engaged in that unlawful enterprise, shot and killed the deceased, who was then in the performance of his duty, as Deputy Sheriff of the county, guarding the jail. A homicide committed under such circumstances is not justifiable, and the instruction asked by the defendant and modified by the Court was, therefore, irrelevant to the evidence in the case.

Id.—Id. If an instruction in a case is asked which is irrelevant to facts, which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury were misled by it to the prejudice of the defendant.

Id.—Id. Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant.

Id. Per McKinstry, J., Ross, J., concurring: The instruction asked by defendant was substantially given by the Court. As an abstract proposition, the "modified" instruction given is correct. Homicide is justifiable when committed in defense of person "against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to do some great bodily injury," etc. The Court also instructed the jury that homicide is justifiable when committed in defense of person against one who endeavors to do great bodily injury—without reference to the manner. If it be suggested that the modified instruction, although abstractly correct, must have misled the jury to the belief that a homicide cannot be justified except as against an attempt to do great bodily harm *violently or tumultuously*, the suggestion is met by an examination of the evidence. From this it appears that there was no evidence tending to prove any unlawful attempt on the part of deceased. Both of the instructions given were merely abstract statements of the law, not applicable to evidence before the jury; neither could have injured the defendant.

EVIDENCE—JURYROOM—DIAGRAM—MAP. *Per McKee, J.:* 4. There was no error in denying the request made by the attorney of the defendant to let the jury, upon retiring for deliberation, take with them the diagram which had been used at the trial of the case in the examination of some of the witnesses. Section 1137 of the Penal Code is not mandatory. It directs the Court to allow the jury to take with them any papers received as evidence which may be of service to them in making up their verdict, but none can be taken without permission of the Court. The matter is therefore left to the sound discretion of the Court, and its action is not revisable, unless there has been an abuse of discretion.

ID.—ID. *Further,* the statute only refers to "papers received as evidence." Papers receivable as evidence on the trial of a case are public and private writings. These are, when proved, primary, secondary, or *prima facie* evidence of their contents. Published maps or charts are, also, under certain circumstances, made by law *prima facie* evidence of facts of general notoriety and interest (Section 1966, C. C. P.), but a diagram is not a public nor private writing, nor is it made by law primary or secondary or *prima facie* evidence of any fact or object represented by it.

ID. *Per McKinstry, J., Ross, J., concurring:* Section 1137 of the Penal Code permits the jury, on retiring, to take with them "all papers which have been received as evidence in the case," and, "the written instructions given." A *diagram*—not claimed nor purported to be an accurate representation—used only to illustrate the testimony of a witness, is not "received in evidence" within the meaning of the section. But even with respect to papers introduced in evidence, and to written instructions, their contents are usually fully made known to the jury before their retirement. In aid of their recollection of the contents of a paper given in evidence, or of an instruction given, the jury may ask for the paper or instruction; but, if they believe themselves sufficiently acquainted with the contents, they may decline to take up the paper or instruction with them. It is not the absolute right of the prosecution or defense to have the papers or instructions sent with the jury, unless the jury demand it.

Appeal from Superior Court, Kern County.

Arick and Fay, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

1. The District Attorney, in the examination of jurors, challenged a juror named Craig, upon the ground that he had not been in the county for the past ninety days, and the Court allowed the challenge, to which ruling the defendant excepted.

Assuming that the juror was competent, and that the Court erred in allowing the challenge, the action of the Court is not reviewable here, because there was no denial of the facts alleged as ground of the challenge taken by the District Attorney, and no exception was interposed by the defendant to the challenge (Sec. 1077, 1061, 1062, Penal Code); therefore the decision of the Court, in allowing the

challenge did not constitute the subject of an exception (Sec. 1170, *supra*); and, under such circumstances, the decision is not open to review. (*People vs. Atherton*, 51 Cal. 495; *People vs. Colson*, 49 Id. 679; *People vs. Murphy*, 45 Id. 137.)

2. Nor was there any error in disallowing the challenge taken to the juror Hayden, on the ground that he had formed an unqualified opinion, because the opinion, which the juror had formed or expressed, was founded upon what he had read in newspapers, and he testified that he could, notwithstanding the opinion, act impartially and fairly upon the matters which were to be submitted to him. The opinion was therefore of such a character as did not disqualify him. (Secs. 1074, 1076, *supra*.) Besides, in challenging the juror, the defendant did not state the specific grounds upon which the challenge was taken. At the close of the examination of the juror, on his *voir dire*, counsel for the defendant arose and said, "I challenge the juror." This was insufficient. "When a prisoner intends to exercise his right of challenge under the statute he is bound to designate, in some way, the objections upon which it is his purpose to rely. He is not permitted to interpose a challenge of such an indefinite character that it cannot be ascertained if it be for implied or for actual bias." (*People vs. Renfrow*, 41 Cal. 38; *People vs. Cotta*, 49 Id. 166; *People vs. Buckley*, Id. 241.)

3. The next assignment of error is that the Court erred in refusing to instruct the jury as follows: "Homicide is justifiable when committed in defense of person against one who manifestly intends or endeavors to do some great bodily injury upon any person." But the Court had, in its general charge to the jury, given the following instruction: "Homicide is also justifiable when committed by any person in either of the following cases: 1st. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury," etc.; and that was substantially the instruction asked by the defendant. Having already given an instruction upon the subject, properly and with sufficient fullness, it was not necessary to give the additional instruction, which simply presented the same subject in language less explicit.

A Court is not bound to repeat itself at the request of counsel. After it has already given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may well be refused.

Again, it is urged that the Court modified the instruction, which it had refused as above, so as to read as follows:

"Homicide is justifiable when committed in defense of person against one who manifestly intends and endeavors in a violent, riotous, or tumultuous manner, to do some great bodily injury upon any person;" and thus modified gave it to the jury; and that is assigned as error.

The right of self-defense does not depend upon the manner in which an assault may be made, nor can it be limited to a mere right of resistance to a design and a danger, which arise out of circumstances of tumult and riot. If a person, in the circumstances in which he may be placed, has reasonable grounds to apprehend a design on his life or to do him some great bodily injury, and there be imminent danger that it may be accomplished, the right of self-defense arises, and may be exercised even to the taking of life, whether the design be manifested and the danger impend noiselessly or in a riotous and tumultuous manner. A design to commit a felony is not always accompanied by riot and tumult, nor is the imminency of danger always measurable by the noise which it makes.

But whether the instruction in its restrictive sense was correct, or misleading, and, therefore, erroneous, is of no practical moment in the case, because there was no evidence tending to show that the deceased had assailed the defendant in a riotous or tumultuous manner or otherwise; or that the defendant had any grounds, reasonable or otherwise, to apprehend danger from the deceased. On the contrary the evidence showed that, on the day of the homicide, a mob had riotously assembled, for the purpose of breaking into the jail of Kern County, to take out a prisoner and hang him, and that the defendant, as one of the mob, while engaged in that unlawful enterprise, shot and killed the deceased, who was then in the performance of his duty, as Deputy Sheriff of the county, guarding the jail. A homicide committed under such circumstances is not justifiable, and the instruction asked by the defendant and modified by the Court, was, therefore, irrelevant to the evidence in the case.

If an instruction in a case is asked which is irrelevant to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury were misled by it to the prejudice of the defendant.

Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant. "As there was no question of justifiable homicide in the case," says Justice

Bronson, in the case of *The People vs. Shorter*, 2 N. Y. 203, "the prisoner had no right to call on the Court to instruct the jury on that subject; and although the instruction given was wrong in point of law, I do not see how it can possibly have operated to the prejudice of the prisoner."

4. There was no error in denying the request made by the attorney of the defendant to let the jury, upon retiring for deliberation, take with them the diagram which had been used at the trial of the case in the examination of some of the witnesses. Section 1137 of the Penal Code provides that "upon retiring for deliberation the jury *may* take with them all papers which have been received as evidence in the case, except depositions, or copies of such papers as ought not, in the opinion of the Court, be taken from the person having them in possession," etc. The statute is not mandatory. It directs the Court to allow the jury to take with them any papers received as evidence which may be of service to them in making up their verdict, but none can be taken without permission of the Court. The matter is therefore left to the sound discretion of the Court, and its action is not revisable, unless there has been an abuse of discretion. But the statute only refers to "papers received as evidence." Papers receivable as evidence on the trial of a case are public and private writings. These are, when proved, primary, secondary, or *prima facie* evidence of their contents. Published maps or charts are, also, under certain circumstances, made by law *prima facie* evidence of facts of general notoriety and interest (Section 1936, C. C. P.); but a diagram is not a public nor private writing, nor is it made by law primary or secondary or *prima facie* evidence of any fact or object represented by it. When used on the trial of a case it is not used as evidence—it does not prove nor tend to prove, in the sense of evidence, any fact; it is simply a figure drawn to suggest to the minds of the jurors the relations between objects about which a witness is testifying, and may be drawn on paper or on a stationary blackboard, which cannot be removed. The very construction of the figure itself is defined by the testimony of the witness, and as illustratory of his testimony it partakes of it, in the same way that the clearness of the expression of the witness partakes of his evidence; as such it was receivable by the jury, and was, in fact, taken with them upon their retirement, as much as any other part of the evidence. The bodily presence of the diagram was therefore unnecessary—it would not have made any more intelligible the evidence into which it had entered, and upon which the jury were bound

to make up their verdict. The jury themselves saw no necessity for it, for they did not ask for it; therefore its absence was not prejudicial to the defendant, and could not have influenced their verdict; and that which could not have influenced the verdict will not be used to vitiate it.

Judgment and order affirmed.

CONCURRING OPINION.

1. I concur. The juror *Craig* was not challenged on the ground "that he had been absent from Kern County for ninety days," as stated by appellant. The evidence tended to prove, and the Court below found it did prove, he had not been a *resident* of the county "for ninety days before being selected and returned." (C. C. P., 198; P. C., 1072.)

2. As to defendant's challenge to the juror *Hayden*, the "having formed an unqualified opinion" is no longer a cause of challenge for "implied bias." (P. C., 1074.) It does not of itself constitute cause of challenge for "actual bias." The fact that a juror has formed or expressed such opinion may be proved as tending to establish "the state of mind" of the juror. (P. C., 1073, sub. 1.) But it is the duty of the trial Court to find against the challenge for actual bias, when supported by evidence of an unqualified opinion, if satisfied that the juror's opinion is founded "upon common rumor," etc., and that, notwithstanding his opinion, he can and will "act impartially and fairly upon the matters submitted to him." (P. C., 1076.) There is no way in which the finding of the trial Court upon the issue of fact—the presence or absence of actual bias—can be reviewed here. (P. C., 1170.)

3. The instruction asked by defendant was substantially given by the Court. As an abstract proposition, the "modified" instruction given is correct. Homicide is justifiable when committed in defense of person "against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to do some great bodily injury," etc. The Court also instructed the jury that homicide is justifiable when committed in defense of person against one who endeavors to do great bodily injury—without reference to the manner. If it be suggested that the modified instruction, although abstractly correct, must have misled the jury to the belief that a homicide cannot be justified except as against an attempt to do great bodily harm *violently or tumultuously*, the suggestion is met by an examination of the evidence. From this it appears that there was no evidence tending to prove *any* unlawful attempt on the part of

deceased. Both of the instructions given were merely abstract statements of the law, not applicable to the evidence before the jury; neither could have injured the defendant.

4. Section 1137 of the Penal Code permits the jury, on retiring, to take with them "all papers which have been received as evidence in the case," and, "the written instructions given." A *diagram*—not claimed nor purporting to be an accurate representation—used only to illustrate the testimony of a witness, is not "received in evidence" within the meaning of the section. But even with respect to papers introduced in evidence, and to written instructions, their contents are usually fully made known to the jury before their retirement. In aid of their recollection of the contents of a paper given in evidence, or of an instruction given, the jury may ask for the paper or instruction; but, if they believe themselves sufficiently acquainted with the contents, they may decline to take the paper or instruction with them. It is not the absolute right of the prosecution or defense to have the papers or instructions sent with the jury, unless the jury demand it.

MCKINSTRY, J.

I concur: ROSS, J.

IN BANK.

[Filed October 10, 1882.]

No. 10,777.

PEOPLE, RESPONDENT,

vs.

CHEONG FOON ARK, APPELLANT.

GRAND LARCENY—FELONIOUS TAKING—INSTRUCTION. In a case of grand larceny the following instruction, "Grand larceny is the stealing, taking, or carrying away the personal property of another of the value of over fifty dollars," is erroneous, because of the omission of the word "felonious." (Penal Code, 484.)

Id.—BURDEN OF PROOF. The burden of proof does not shift from the prosecution to defendant in cases of larceny. Section 1105 of the Penal Code applies to homicide cases only.

Id.—Id. As the jury must be entirely satisfied that defendant committed the offense charged, it is error to refuse the instruction: "The evidence in a criminal case must satisfy the jury to a moral certainty and beyond a reasonable doubt; that is, it must entirely satisfy the jury of the guilt of the defendant before they can convict. If the jury are not entirely satisfied they should acquit."

Appeal from Superior Court, San Francisco.

Neeltes, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was convicted of the crime of grand larceny,

and larceny is defined by Section 484 of the Penal Code to be, "the *felonious* stealing, taking, carrying, leading, or driving away, the personal property of another." The Court instructed the jury as follows: "Grand larceny is the stealing, taking, or carrying away the personal property of another, of the value of more than fifty dollars,"—omitting the word *felonious*. The charge was erroneous, as it omitted that word.

The Court told the jury that grand larceny is the stealing, taking, or carrying away (in the disjunctive) the property of another. That is not the definition given by the statute, and is in no sense a correct definition of the offense. One person may take or carry away the property of another, of the value of over fifty dollars, without being guilty of any offense whatever. But if he does the act *feloniously*, the statutory crime is committed.

The Court further instructed the jury as follows: "The prosecution in a criminal case is bound to make out its case beyond a reasonable doubt. A mere preponderance of testimony is not sufficient. A *preponderance* of testimony is sufficient, as I understand the decision of the Supreme Court, to make out the innocence of the defendant."

The learned Judge misunderstood the rule as laid down by the Supreme Court. It is true that such has been held to be the rule in the single case of homicide; and, in that particular case, because Section 1105 of the Penal Code provides that where the commission of the homicide by the defendant has been proved, the *burden* of proving circumstances of mitigation or that justify or excuse the killing devolves upon the defendant; but as to other crimes, in respect to which there is no similar statutory provision, a different rule exists, as was held by this Court in the case of *People vs. Marshall*, 8 Pac. C. L. J. 841. Mr. Justice Ross, delivering the opinion in that case, says: "It is a cardinal rule in criminal cases that the burden of proof rests on the prosecution. It would manifestly be shifting this burden from the prosecution to the defendant, to require the latter to establish his defense by a preponderance of evidence, and would deprive him of the doctrine of a reasonable doubt, to the benefit of which he is justly and everywhere held entitled."

There is one other point in the case deserving of notice, and that is the refusal of the Court to give the following instruction, requested by the defendant:

"The evidence in a criminal case must satisfy the jury to a moral certainty and beyond a reasonable doubt—that is, it

must entirely satisfy the jury of the guilt of the defendant before they can convict. If the jury are not entirely satisfied they should acquit."

In the case of the *People vs. Brown*, 8 Pac. C. L. J. 338, this Court held that the following instruction given to the jury was erroneous:

"You are not legally bound to acquit him (defendant) because you may not be entirely satisfied that the defendant, and no other person, committed the alleged offense." (See, also, *People vs. Kerrick*, 52 Cal. 446.)

The converse of the rule laid down in the above case is, that the jury must be entirely satisfied that the defendant committed the offense charged against him, and it was error to refuse the charge to that effect, as requested by the defendant.

Judgment and order reversed and cause remanded for a new trial.

We concur: Ross, J., Myrick, J., McKee, J., Thornton, J.

CONCURRING OPINION.

I concur in the judgment, and in the opinion, except with respect to what is said in reference to Section 1105 of the Penal Code.

McKINSTRY, J.

IN BANK.

[Filed October 10, 1882.]

No. 7091.

BENJAMIN, RESPONDENT,

vs.

STEWART ET AL., APPELLANTS.

~~DAMAGES~~ — NEW TRIAL — ASSAULT — DEPARTMENT — BANK. Opinion of Department (9 Pac. C. L. J. 273,) adopted by the Court in bank.

Appeal From Fifteenth District Court, San Francisco.

~~Mc~~ *Clure* and *Van Clief*, for appellants.

~~Sh~~ *arp & Sharp*, for respondent.

By the COURT:

We are satisfied with the views expressed by Department of this Court in its opinion in this case, filed March 20, 1882, (9 Pac. C. L. J. 273); and for the reasons therein given the order appealed from is reversed and the cause is remanded.

DEPARTMENT No. 1.

[Filed October 9, 1882.]

No. 7959.

MUIR, RESPONDENT, VS. GALLOWAY ET AL., APPELLANTS.

PRACTICE—EXTENSION OF TIME—STATEMENT—NEW TRIAL—SUNDAY. October 20, 1880, verdict was rendered. Notice of intention to move for new trial was filed and served October 29th. November 8th defendants obtained from the Judge of the Court below an order granting ten days from date in which to file statement on motion for new trial, etc. November 18th a like order was obtained. November 28th was Sunday. November 27th defendants obtained a further order granting ten days from November 29th in which to prepare a statement on motion for new trial. *Held*, the orders did not extend the time for preparing and serving statement "more than thirty days." (C. C. P. 1054.) The last day of the period of extension fixed by one of the orders being Sunday, it should be excluded. (Id. 12.) It is not to be computed as any portion of the time granted by the order, but it is a supplementary day superadded by law.

DEED—MARRIED WOMAN—ACKNOWLEDGMENT. Objections to deed because improperly acknowledged by a married woman held improperly sustained. The acknowledgment was taken under the Act "concerning conveyances." (Stats. 1856, p. 249.) The only departure from the form prescribed consists in the substitution of the words "on a private examination separate and apart from her husband" for "on an examination apart from and *without the hearing of* her husband."

ID.—ID. The "examination" mentioned in the statute and acknowledgment means an inquiry in response to which the married woman shall declare that she has executed the deed "freely and voluntarily," etc. Such an examination to be "private" must necessarily be "without the hearing of her husband." But all doubt is removed by the certificate of the officer. The private examination was "separate and apart from her husband." It would be to give a strained and unnatural signification to the words employed, to say that a private examination separate and apart from the husband might have been within his hearing.

Appeal from Superior Court, San Francisco.

Barnes and Cary, for appellants.

L. E. Bulkeley, for respondent.

By the COURT:

1. The orders of the Judge did not extend to the time for preparing and serving statement "more than thirty days." (C. C. P., 1054.) The last day of the period of extension fixed by one of the orders being Sunday, it should be excluded." (C. C. P., 12.) That is to say, it is not to be

computed as any portion of the time granted by the order, but it is a supplementary day superadded by law.

2. The acknowledgment by Mrs. Jane T. Galloway of the execution of her deed of March 13, 1854, is in words and figures following:

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

"On this 13th day of March, A. D. 1854, before me, a Notary Public in and for said county, personally appeared Joseph Galloway and Jane T., his wife, to me severally known to be the persons described in, and who executed the within conveyance, and they severally acknowledged to me that they had executed the same freely and voluntarily, for uses and purposes therein mentioned; and the said Jane T., having been by me made acquainted the contents of the said deed, on a private examination, separate and apart from her said husband, acknowledged to me that she had executed said deed freely and voluntarily, without any fear, compulsion, or undue influence on the part of her husband, and that she did not wish to retract the execution of the same.

"In witness whereof I have hereto set my hand and official seal.

" [Seal]

GILBERT A. GRANT,
"Notary Public."

When the acknowledgment was taken the Act "concerning conveyances" of April 6, 1850, was in force. (Stats. 1850, p. 249.) The twenty-third section of that Act reads as follows:

"The certificate shall be in the form heretofore given, and shall set forth that such married woman was personally known to the officer granting the same; to be the person whose name is subscribed to such conveyance as a party thereto, or was proved to be such by a credible witness, whose name shall be inserted in the certificate, and that she was made acquainted with the contents of such conveyance, and acknowledged, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same. Every certificate which substantially conforms to the requirements of this Act shall be valid."

The only departure from the form prescribed by the

statute in the acknowledgment, necessary to be considered, consists in the substitution of the words "on a private examination separate and apart from her husband," for "on an examination apart from and *without the hearing* of her husband."

The "examination mentioned in the statute and acknowledgment means an inquiry in response to which the married woman shall declare that she has executed the deed "freely and voluntarily," etc. Such an examination to be "private" must necessarily be "without the hearing of her husband." But all doubt is removed by the certificate of the officer. The private examination was "separate and apart from her husband." It seems to us that it would be to give a strained and unnatural signification to the words employed to say that a private examination separate and apart from the husband might have been within his hearing.

The Court below erred in sustaining the objections to the deed.

Judgment and order reversed and cause remanded for a new trial.

Abstracts of Recent Decisions

CONDITIONAL SALES. F. sold furniture to H., and delivered it upon an agreement on the part of H. to execute back a mortgage upon it. Held, that no title passed until execution of mortgage. *Thorpe vs. Fowler*, Sup. Ct. Iowa, 26 Alb. L. J. 258.

MISTAKE OF LAW AND OF FACT. The mistake of a scrivener in one State as to the law of another State, made in drawing a deed, is a mistake of fact. *Sampson vs. Mudge*, 13 Fed. Rep. 260.

EMINENT DOMAIN—COMPENSATION. Where a railroad company obstructs an alley in a city by building a railroad through the alley so as afterward to make the alley useless as an alley, an abutting lot owner has the right, if he chooses, to consider the obstruction as a permanent taking and appropriation by the railroad company, and may commence an action and recover damages for such obstruction. The measure of damages will be the injury to his lot at the time the alley was taken and appropriated by the railroad company, and not at the time of the trial of the case. (*Central Branch Union Pacific Railroad Company vs. Andrews*, Sup. Ct., Kansas, 1882.)

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Current Topics.

RIGHTS OF MARRIED WOMEN.

The Supreme Court of California, in *Buller vs. Baber*, 54 Cal. 178, held that a promissory note made March 12th, 1874, by a married woman, was invalid, the law at that time providing that "a wife cannot make a contract for the payment of money" (Section 167, Civil Code). At that time Section 158 of the Civil Code read as it does now, viz.: "Either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried." The former provision was evidently intended to make an exception of promissory notes made by married women. In *Brickell vs. Batchelder*, 9 Pac. C. L. J. 527, the same Court affirms *Buller vs. Baber*, and says that by a change in the law (taking effect July 1st, 1874) "a married woman could make such a contract and bind herself by note or mortgage" (the change was simply a repeal of Section 167, leaving Section 158 as above). In *Wood vs. Orford*, 52 Cal. 412, and *Alexander vs. Bouton*, 55 Cal. 19, promissory notes executed by married women since the said change in the law have been held valid.

The law has always guarded with watchful care all conveyance of realty made by married women. In order to protect her from imposition she is compelled to be examined in regard to her knowledge of the instrument of conveyance and her willingness to convey, and to have a certificate attached to the conveyance setting forth these and other requirements of the law. In California, prior to the adoption of the Codes (January 1st, 1873), *execution, acknowledgment and certification* were all three essentials of the conveyance of a married woman, and a defect in any one of these three was fatal and could not be corrected. Under the Code, *execution and acknowledgment* alone are essentials.

The certificate of acknowledgment not being an essential, may be corrected if it is defective. The only difference between the requirements of the law in her case and in that of a femme sole or of a man is that the conveyance by a married woman has no validity until acknowledged, whereas a conveyance by any other person is valid as soon as executed. (*Wedel vs. Herman*, 8 P. C. L. J. 1131; 9 id. 303.)

A married woman cannot be an administratrix. The law allows her to deal with her own property as she alone wills, free from the control of her husband. She can make her own debts and she can pay them. She can dispose of her lands and can no longer keep both land and purchase money because of some *lapsus pennae* of a careless notary. She can practice medicine, law, and politics. She can sell beer in saloon and dive. All occupations open to men are open to women, married or single. But she cannot administer upon the estates of others. She can administer upon her own estate while there is breath within her body, but not upon that of others. She cannot vote.

Such are the rights of married women before the laws of California.

Supreme Court of California.

In Bank.

[Filed October 9, 1882.]

No. 7428.

CITY OF NAPA, RESPONDENT,

vs.

EASTERBY ET AL., APPELLANTS.

CITY OF NAPA—CHARTER—ORDINANCE—PUBLICATION—STREET ASSESSMENT—OFFICIAL GRADE. The Act to reincorporate the city of Napa was approved February 24, 1874. Sections of the Act were amended March 29, 1876, and again amended April 1, 1878. See Statutes 1873-4, p. 140; 1875-6, p. 550; 1877-8, p. 1011.

The proceedings were for the recovery of a street assessment. Section 2 of the city charter provides: "The Board of Trustees *shall cause to be published* in some newspaper in the city all ordinances which shall be certified and signed by the President and Clerk of the Board, and no ordinance shall take effect and be in force until ten days from the first publication thereof." Appellant argued the plaintiff failed to prove that the ordinances were published; also, that plaintiff failed to

prove that the Board of Trustees caused them to be published. *Held*, the requirement that the Board of Trustees shall "cause to be published" all ordinances, means that the Board shall order the publication.

Id.—Id. As the case is presented, it does not appear either what was the order of the Board of Trustees, or that the publication—*It* made at all—was made in accordance with any order of the Board.

Id.—OFFICIAL GRADE. It does not appear that the official grade has ever been established by any ordinance of the Board of Trustees.

Id.—Id. The Board of Trustees had no power to establish a general system of grades; it had no power to establish a grade for any portion of a street except upon petition of property owners.

Id.—Id. The purpose of the charter is that the adjacent property shall pay for the establishment of the grade, and that the power to establish a grade shall be employed only by an ordinance assessing the charge thereof, upon the property fronting on the street, or portion of street, where the grade is established.

Id.—Id. Further: When Ordinance No. 42 was adopted, the Board of Trustees had power to provide for establishing a grade "without petition." But they could establish a grade only by providing for the payment of the expense of its establishment by means of assessments upon the property fronting upon the street, or portion of street, where the grade was to be established. The Board could order the work to be performed "at the expense of the property on said street, avenue or alley, to be assessed upon it in proportion to the number of front feet of the several lots," etc.

Id.—Id. The assessment upon the adjacent property is part of the establishment of a grade. Even if it should be admitted, therefore, that, when Order No. 42 was passed, the Board had power by one ordinance (or "resolution" even) to establish the grades of all streets, avenues, and alleys within the limits of Napa City, such grades would become "established" only when (at least) assessments had been levied upon the property fronting upon all the streets, avenues and alleys.

Id.—Id. The case shows, not only that such assessment was not ordered by the Board of Trustees, but that no such assessment was in fact made. On the contrary, it affirmatively appears from the record that the person whose "system of grading and sewage" was adopted, and declared to be the "official system," was paid for his services out of the city treasury. This, although Section 18 of the charter provides that "the city of Napa shall not pay for establishing the grade" of streets, and Sections 19 and 30 that property fronting upon shall pay for establishing its grade.

Id.—Id. The finding that "the grade of the street on which was done the work for which the assessment mentioned in the complaint was made, had been and was duly established at the time of the adoption of the resolution of intention hereinafter named," is not sustained by the evidence.

Appeal from Superior Court, Napa County.

Brooks & Levison, for appellants.

Henning & Thiele, for respondent.

McKINSTRAY, J., delivered the opinion of the Court:

The Act to reincorporate the city of Napa was approved February 24, 1874. Sections of the Act were amended March 29, 1876, and again amended April 1, 1878.

The bill of exceptions alleges that plaintiff "read and put in evidence" ordinances of the Board of Trustees of the city of Napa, Nos. 42, 74 and 77.

The ordinances, as they purport to be recited in the bill, adopt and recognize the "grade and sewer maps and system of grading and sewage represented on said maps and accompanying diagrams" prepared and reported by W. P. Humphreys as the "official system of grades and sewage of the city of Napa," etc.

The bill of exceptions does not show any objection to the ordinances when they were offered.

Ordinance No. 42 was adopted December 7, 1874, Ordinance No. 74, September 19, 1878, and Ordinance 77, January 23, 1879.

Section 9 of the city charter provides: "The Board of Trustees *shall cause to be published* in some newspaper in the city all ordinances which shall be certified and signed by the President and Clerk of the Board, and no ordinance shall take effect and be in force until ten days from the first publication thereof."

It is urged by appellant:

First—Plaintiff failed to prove that the ordinances were published.

Second—Plaintiff failed to prove that the Board of Trustees caused them to be published.

Section 9 of the city charter proceeds: "A copy of such ordinance published or purporting to have been published by authority in the official newspaper of the city, shall be *prima facie* evidence that such ordinance has been regularly and legally passed and authenticated, and that the provisions of the ordinance are as published, and that such ordinance was published by the order of said Board of Trustees at the date when said publication purports to have been made."

It may be said that, inasmuch as no objection was made to the ordinances when offered, and as by Section 9 of the charter, an ordinance may be proved, *prima facie*, by production of a copy purporting to be published by authority in the official newspaper, this Court, in support of the action of the Court below, will presume that Ordinances 42, 74 and 77 were thus proved. Further, inasmuch as the charter provides that no ordinance shall take effect and be of force until after publication, they were not valid or effective ordinances unless published, and, consequently, the recital in the bill of exceptions that plaintiff "put in evidence" the ordinances, must be held to be a recital that the ordinances were duly

published. But an ordinance, *res ipsa*, although it may have no binding effect until after appropriate publication, is a different thing from its publication. It may be proved by the original entry of it in the proper book, or perhaps by certified copy or from the printed volume of ordinances.

We are not authorized to infer that it was properly published because it was passed, and the provision of the charter which makes the newspaper publication evidence *prima facie* of the ordinance, does not make the ordinance itself presumptive, or any evidence of the newspaper publication.

Even if it should be admitted, however, that we should presume the ordinances and their publication to have been proved below by the newspaper copy, we cannot say, in the absence of the evidence of the publication in the newspaper, when they took effect, or that they were in force when the proceedings were taken which were the foundation of this action. Section 9 provides that the production of the newspaper copy shall prove, *prima facie*, that an ordinance was published "at the date when said publication purports to have been made." We can only tell the date at which a publication purports to have been made from the publication itself.

The charter requires that the Board of Trustees shall "cause to be published" all ordinances. This means that the Board shall order the publication. (Temple, J., in *Chambers vs. Satterlee*, 40 Cal. 521; *Donnelly vs. Tillman*, 47 Id. 41; *Donnelly vs. Marks*, Id. 191; *Himmelman vs. Satterlee*, 49 Id. 387; *Reese vs. Graff*, 51 Id. 90.)

It is true Section 9 of the charter of the city of Napa provides that the newspaper copy of an ordinance shall establish, *prima facie*, that the ordinance was published by order of the Board, at the date when said publication "purports to have been made." But, in the absence of the notice or publication, we cannot say what was its purport. It follows, that, as the case is presented, it does not appear either what was the order of the Board of Trustees, or that the publication—if made at all—was made in accordance with any order of the Board.

At a stage of the trial different from that at which the plaintiff "put in evidence," the ordinances above mentioned, plaintiff called J. E. Walden as a witness, who testified:

"I am foreman of the *Napa Reporter*."

"Q.—Was *Napa Reporter* an official paper in 1874?

"Counsel for defendants objected as incompetent, etc.

"Witness—Ordinance No. 42 was published December 12, 1874."

This clearly shows that the Ordinance No. 42 was proved as an independent fact, and that the distinct fact of its publication was sought to be established by the oral testimony of the witness *Walden*; in other words, that the Ordinance 42, its contents and the regularity of its passage and adoption, and the order of the Board directing it to be published, were not proved by the production of a copy of the ordinance as published. But Section 9 of the charter makes a copy of the order published by authority, etc., *alone* presumptive evidence of the matters therein mentioned, including the fact that the ordinance was published by order of the Board. The statement of a witness that the ordinance was published creates no presumption that it was published by order of the Board of Trustees. It follows again that the case does not show that the Board "caused to be published" the Ordinances 42, 74 and 77.

It does not appear, therefore, that the official grade has ever been established by any ordinance of the Board of Trustees.

But if it had been proved that the Ordinances 42, 74 and 77 had been duly published by order of the Board, the question would remain: Did the Board have power, by ordinance, to declare and adopt "an official system of grades" for the city of Napa?

Doubtless, it would seem more convenient to establish by one ordinance a system of grades having reference to a common level. It would also seem peculiarly proper that the Board of Trustees should have power to establish a symmetrical plan of grades for the whole city, irrespective of any application by property owners. But an examination of the charter—as the same read when Ordinances Nos. 74 and 77 were passed—will show not only that the Board had no power to establish a general system of grades, but the Board had no power to establish a grade for any portion of a street except upon petition of property owners.

The seventh subdivision of Section 11 of the charter reads: "The Board of Trustees are authorized and empowered to *establish the grade* of all streets, avenues and alleys, and to require and enforce conformity thereto." But the second subdivision of the same section empowers the Board "to provide for * * * working, grading, improving and repairing of streets, avenues and alleys," and no one would claim that this language is to be construed without reference to the subsequent provisions which provide the manner in which the power to "work, grade and improve" is to be exercised. The charter is to be read as

a whole, and, in both instances, the mode is the measure of the power. Section 18 commences: "The city of Napa shall not pay for *establishing the grade*, grading, working, improving, or repairing streets, etc., but *all such expenses* shall be assessed upon the property fronting on such streets, avenues and alleys as hereinafter provided," etc.

Section 19. "When the owners of more than one-half in frontage of the property *fronting on any street*, or portion thereof, between the center line of two cross streets, * * * shall desire to *have the grade established*, or to grade, fill, plank, etc., and shall petition the Board of Trustees in writing asking that the same may be done, the Board may order said work to be done as requested, at the expense of the property fronting on said street," etc.

Section 20. "The Board of Trustees may at any time, without petition, * * * provide for grading, filling, planking, paving, macadamizing, or gravelling streets, * * * or otherwise *improving or repairing* the same, and shall proceed in letting contracts and *assessing* the expense of such work upon the property chargeable therewith in the same manner as in cases of assessment made upon petition," etc. (Stats. 1877-8, p. 1017. Amendment took effect June 1, 1878.)

Thus appears the evident purpose that the adjacent property shall pay for the establishment of the grade, and that the power to establish a grade shall be employed only by an ordinance assessing the charge thereof, upon the property fronting upon the street, or portion of street, where the grade is established.

Not only so, but inasmuch as in every enumeration of powers conferred upon the Board of Trustees, the power to establish the grade is spoken of as a different thing from the power to provide for *grading*, and as by Section 30 the power to establish the grade, without permission, is not conferred upon the Board, the Board of Trustees has no power, without petition, to provide for grading a street, until after the grade of such street has been established *upon petition*. Certainly no street can be graded until its grade has been established, and its grade cannot be established except upon the written petition of the owners of more than one half of the frontage. (Section 18.)

We cannot inquire whether this is the best system which could have been adopted. It is the system found in the charter.

It is true, Ordinance No. 42 was passed prior to the adoption of the amendment of Section 30 of the city charter

found in the Act which took effect June 1, 1878. When No. 42 was passed, Section 30 read: "The Board of Trustees may at any time, without petition, provide *for establishing grades* * * * and for repairing streets," etc. But in the same section it was provided that the Board "shall proceed in assessing the expenses of such work *upon the property chargeable therewith*, as hereinbefore provided."

When, therefore, Ordinance No. 42 was adopted, the Board of Trustees had power to provide for establishing a grade "without petition." But they could establish a grade only by providing for the payment of the expense of its establishment by means of assessments upon the property fronting upon the street, or portion of street, where the grade was to be established. The Board could order the work to be performed at the expense of the property fronting on said street, avenue or alley, to be assessed upon it in proportion to the number of front feet of the several lots," etc. (Section 19.)

It is certain in no case would the grade be established until the assessment had been ordered, or, at least, made. Reading the several sections together it would seem evident it was intended that, as a separate act, a grade should be established along a street or a portion thereof, "between the center lines of two cross streets, or between the center line of a cross street and the terminus of a street." (Section 19.)

At all events, the assessment upon the adjacent property is part of the establishment of a grade. Even if it should be admitted, therefore, that, when Order No. 42 was passed, the Board had power by one ordinance (or "resolution" even) to establish the grades of all streets, avenues and alleys within the corporate limits of Napa City, such grades would become "established" only when (at least) assessments had been levied upon the property fronting upon all the streets, avenues and alleys.

The case shows, not only that such assessment was not ordered by the Board of Trustees, but that no such assessment was in fact made. On the contrary, it affirmatively appears from the record that the person whose "system of grading and sewage" was adopted, and declared to be the "official system," was paid for his services out of the city treasury. This, although Section 18 of the charter provides that "the city of Napa shall not pay for establishing the grade" of streets, and Sections 19 and 30 that property fronting upon a street shall pay for establishing its grade.

The Court below found:

"6th. That the grade of the street on which was done the work for which the assessment mentioned in the complaint was made, had been and was duly established at the time of the adoption of the resolution of intention hereinafter named."

From what has been said it follows that the 6th finding is not sustained by the evidence.

Judgment and order reversed and cause remanded for a new trial.

I concur: Morrison, C. J.

We concur in the judgment on the first ground stated by Mr. Justice McKinstry: Myrick J., Ross, J.

I concur on the second ground stated in the opinion: Thornton, J.

IN BANK.

[Filed October 11, 1882.]

No. 10,729.

PEOPLE, RESPONDENT, vs. DAVIS, APPELLANT.

PERJURY—OATH—CONVICTION. Where in a prosecution for perjury there is but the oath of one person without corroboration against that of defendant's, the law will not suffer a conviction.

Appeal from Superior Court, Stanislaus County.

Budd, Terry & McKinnee, Baldwin and Johnson & Hazen,
for appellant.

Attorney-General Hart, for respondent.

Ross, J., delivered the opinion of the Court:

The defendant was indicted for the crime of perjury. Conviction followed. The perjury charged was alleged to have been committed on the trial of a certain action brought by one Matthews and wife against the defendant, at which time the defendant testified to certain conversations as having taken place—one between himself and Matthews in the city of Stockton, and another between himself, Mrs. Matthews, and Mr. Hewel, at Modesto, in Stanislaus County, and both relating to the execution of a certain promissory note which formed the subject-matter of the action of Matthews and wife against defendant.

No one was present at, or heard, so far as appears, the conversation between the defendant and Matthews at Stockton, except the immediate parties. Yet the Court below instructed the jury: "It is charged by the prosecution that Davis testified falsely as to a certain conversation that he claimed to have taken place in Stockton between himself and H. O. Matthews respecting the giving of this note. It is claimed that the testimony of Davis, if true, was material to that issue. If you find from the evidence that Davis testified as alleged in the indictment concerning the conversation claimed to have taken place between himself and H. O. Matthews in Stockton, then I charge you that the testimony was material to the issue then being tried; and if you further find that that testimony was false and known by defendant to be false, then the defendant is guilty of perjury, and your verdict should be guilty as charged, and this notwithstanding you may find that the other testimony said to have been given by Davis on that trial was in fact true."

This instruction was erroneous; for although Matthews had testified that no such conversation as the defendant swore to on the trial of the action of Matthews and wife against the defendant had occurred, there was but his oath against the oath of the defendant; and under such circumstances the law will not suffer one to be convicted of the crime of perjury. (2 Bishop on Crim. Pro., Sections 866 to 874 inclusive, and authorities there cited.)

There was no evidence corroborative of the testimony of Matthews in respect to the conversation between Davis and himself in Stockton. The Court below, in another part of its charge, recognized the rule of law to which we have referred, but treated as somewhat corroborative of Matthews' testimony the following circumstance: According to the testimony of the defendant on the trial of the action in which the perjury is alleged to have been committed, Matthews spoke in the conversation at Stockton of certain divorce proceedings between the defendant and his wife. Matthews, on the trial of the present indictment, denied that he did so, and further testified that he did not know of the divorce proceedings until after the execution of the promissory note, which followed the conversation at Stockton; and for the purpose of corroborating Matthews in this particular, the prosecution introduced in evidence an envelope addressed to him, which he testified he received from the State of Missouri after the execution of the note, and which he further testified contained the papers in the divorce proceedings, and conveyed to him the first information that

there were any such proceedings pending. But all this depended solely on the testimony of Matthews. Even the fact of his receipt of the envelope after the execution of the note, depended on his testimony alone. As he was not corroborated in any respect the Court below erred in instructing the jury as above indicated.

Judgment and order reversed and cause remanded for a new trial.

We concur: Morrison, C. J., McKinstry, J., Thornton, J., Myrick, J., McKee, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed October 28, 1882.]

No. 7335.

CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

vs.

PHELAN, APPELLANT.

TAXES—ASSESSMENT—RECITALS. Action to recover a personal property tax. The assessment was made to defendant by name. *Held*, the recital in the assessment book, under the head of "Description of Property," that the property is assessed to parties listed, and to "all owners and claimants known or unknown," was an idle recital, and did not place the assessment within the principle decided in *Hearst vs. Egglestone*, 55 Cal. 365, and the other cases therein referred to.

ID.—DUPLICATE ASSESSMENT ROLL—EVIDENCE. The statute makes the duplicate assessment roll, or a certified copy, *prima facie* evidence of a right to recover. This necessarily makes the roll, or the copy, some evidence that the person named did own the property specified.

ID.—ID. Notwithstanding the testimony of defendant that he did not have any money at the time of the assessment, the Court below found against him; with that finding, there being evidence to sustain it, this Court will not interfere.

Appeal from Superior Court, San Francisco.

Sawyer & Ball and Love, for appellant.

Sharp and Bell, for respondent.

By the COURT:

1. The assessment was made to the defendant by name. The recital in the assessment book under the head "Description of Property," that "the property is assessed to parties listed, and to all owners and claimants, known or unknown," was an idle recital, and did not place the assessment within the principle decided in *Hearst vs. Egglestone*, 55 Cal. 365, and the other cases therein referred to.

2. The statute makes the duplicate assessment roll, or a certified copy, *prima facie* evidence of a right to recover. This necessarily makes the roll, or the copy, some evidence that the person named did own the property specified. Notwithstanding the testimony of defendant that he did not have any money at the time of the assessment, the Court found against him; and with that finding, there being evidence to sustain it, this Court will not interfere.

Judgment and order affirmed.

IN BANK.

[Filed October 11, 1882.]

No. 10,745.

PEOPLE, RESPONDENT, vs. HERBERT, APPELLANT.

REPORTER'S NOTES—APPEAL—RECORD. The reporter's notes will not be considered on appeal unless made a part of the record.

INSTRUCTION—EVIDENCE. In the absence of the evidence, there is nothing to show that an instruction requested had any application to the case as made.

ID.—SELF-DEFENSE—APPARENT NECESSITY—HOMICIDE. As to instructions, *Held*: While the language employed by the Court might have been more explicit, taken together, the instructions mean that there must be a necessity, either actual or apparent, for the killing, or it cannot be justified.

WITNESS—CORONER'S JURY. No error in permitting a witness to testify to statements made by defendant before the Coroner's jury.

Appeal from Superior Court, San Francisco.

J. N. Freeman, for appellant.

Attorney-General Hart, for respondent.

Ross, J., delivered the opinion of the Court:

1. The reporter's notes found in the transcript, are not made a part of the record and cannot be considered.

2. The evidence not being before us, there is nothing to show that the instruction requested by the defendant and embodied in the bill of exceptions, had any application to the case as made.

3. There was no error in permitting the witness Thurston to testify to statements made by defendant before the Coroner's jury. (*People vs. Curtis*, 50 Cal. 95.)

4. If the Court below instructed the jury that, in order to justify the defendant, the killing of the deceased was, *in fact*, absolutely necessary, we should not hesitate to reverse the judgment; for such an instruction would have ignored

the doctrine of appearances, established by statute as well as by the common law. But we do not understand, nor do we think the jury could have understood, that the Court did that, for while it told them that to justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary, it also told them that homicide is justifiable if committed in the lawful defense of the person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished (with the qualification that if such person was the assailant, or engaged in mortal combat, he must really and in good faith have endeavored to decline any further struggle before the homicide was committed;) and further, that a bare fear of the commission of the offense, to prevent which homicide may be committed, is not sufficient to justify it, but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

While the language employed by the Court might have been more explicit, we think that, taken together, the instructions mean that there must be a necessity, either actual or apparent, for the killing, or it cannot be justified, and we understand to be true under our statute as well as at the common law.

The first instruction above noticed is a literal copy of Section 31 of the Crimes and Punishment Act of 1850, and the others are taken substantially and almost literally from Sections 197 and 198 of the Penal Code. In a note to the last of the three sections of that Code, prescribing when homicide is excusable and justifiable, the Code Commissioners say:

"The three preceding sections are based upon Sections 29, 31, 32, 33, 34, and 35 of the Crimes and Punishment Act of 1850—Statutes 1850, p. 229. The Commission have modified the language, making it accord, in many respects, with that of the New York Penal Code, Sections 260, 261, and 262. *The legal effect, however, has not been changed.*" So that we know that while the Commissioners changed the language of our statute to conform to that employed in the revised statutes of New York, there was no intention on their part effect any change in the law as declared in the Act of 1850. The language taken from the statutes of New York, and embodied in our Code, was held by the Court of Appeals of that State to be but in affirmation of the rule of the common

law, in the case of *Shorter vs. The People*, 2 Comst. 193. We sum up what we conceive to be the true meaning of our statute on the subject under consideration, in the clear and concise language of the learned Judge who delivered the opinion in the case last cited:

"When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true."

Judgment and order affirmed.

We concur: Morrison, C. J., Myrick, J., Thornton, J.

We concur in the judgment: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed October 28, 1882.]

No. 7647.

HOWARD, RESPONDENT, vs. JACKSON, APPELLANT.

APPEAL—ERROR. No error appearing, the judgment will be affirmed.

Appeal from Superior Court, Alameda County.

Van Ness & Moore, for appellant.

Watt and Van Voorhies, for respondent.

By the COURT:

This is an action on a promissory note, the execution of which is admitted in the answer. The only defense is, that there was an extension of the time of payment. The findings are all in favor of the plaintiff, and no part of the evidence is brought up in the transcript.

There is no error apparent in the proceedings, and the judgment is affirmed.

DEPARTMENT No. 2.

[Filed October 30, 1882.]

MARSTERS, APPELLANT, vs. LASH, RESPONDENT.

FOREIGN LAW—PRESUMPTION—EVIDENCE. In the absence of proof of the law of a foreign State, the presumption is that such law is the same as the law of our own State; not that it is the common law.

PRACTICE—FINDINGS—TITLE. Findings are necessary upon the issue of title to property sued for, and each part thereof.

ID.—PLEADING—DENIALS—VALUE. The Court erred in holding that there was any denial of the allegations as to the value of the property sued for. The allegations were that the mares were valued at \$150, and the horse \$125. The denials were: "Denies that said * * mares are of the value of \$150, and denies that said * * horse is of the value of \$125." Such denials are evasive, and in fact no denials at all.

ID.—COMPLAINT—VERIFICATION. Conceding the complaint to have been unverified, there is no general denial of the allegations of value. If no general denial is made, and specific denials are resorted to, there must be an actual denial and not one in form and substance evasive.

ID.—TESTIMONY—EXCEPTIONS—APPEAL. Objections to testimony will not be considered on appeal in the absence of exceptions to the rulings of the Court admitting the testimony.

Appeal from Superior Court, Siskiyou County.

Nichols and Edgerton, for appellant.

H. B. Gillis, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover of defendant certain personal property consisting of sixteen head of horses, twenty-two head of cattle, and a wagon, averred to be the property of the plaintiff and to be detained from her by defendant. The cause was tried by the Court without a jury, and judgment was rendered for defendant. Appeal was taken by plaintiff from the judgment and an order denying her motion for a new trial.

Issue is joined by the pleadings on the title to the property sued for and each part thereof. The findings do not pass on all such issues. There should be a clear and distinct finding of the ultimate facts on which the title or claim of either party to such property and each portion of it is rested. In failing so to find, the Court erred, and for this the judgment and order must be reversed.

The Court further erred in holding that there was any denial of the allegations as to the value of the property sued for. There were several allegations of this character. As an instance—in averring the value of the horses, which are

stated to consist of four American brood mares, one black or brown horse, etc., the value of the brood mares is alleged to be \$450, of the black or brown horse \$125. These allegations are denied in this mode: "Denies that said four American brood mares are of the value of four hundred and fifty dollars, and denies that said black or brown horse is of the value of one hundred and twenty-five dollars." Such denials are evasive and in fact no denials at all. The Court seemed to have placed its ruling on the ground that the complaint was not verified. Conceding this to be so, we find no general denial of the allegations of value. If no general denial is made, and specific denials are resorted to (as seems to have been done in this cause) there must be an actual denial and not one in form and substance evasive.

The Court ruled as a conclusion of law that the laws of Indiana and Minnesota in relation to the property rights of husband and wife must be presumed to be the common law, there being no proof of what such laws were. Such ruling is contrary to the decisions in this State, which hold that in the absence of proof, it should be presumed that such law is the same as the law of our own State. (*Norris vs. Harris*, 15 Cal. 253; *Hickman vs. Albough*, 21 Id. 222; *Hill vs. Grigsby*, 32 Id. 60.) A question arose in *Smart vs. Baldwin*, (1 Mart. N. S. 523,) whether an instrument executed in Alabama was a mortgage or a sale. On this point the Court said: "The law of Alabama has not been proved, and conformably to the uniform decisions of this Court, we must decide this case by the provisions of our own." And in *Allen vs. Watson*, (2 Hill's S. C. 319,) the Court, speaking of the law of Georgia, invoked in a case before them, said that if they were obliged to determine the question before them, "in utter ignorance of what the law of Georgia is, we must resolve it by our own rule, for the obvious reason that we have no other." (See, also, *Monroe vs. Douglass*, 1 Selden, 452.) Such presumption is indulged for the reason that there being no proof of the law of the foreign forum, of necessity the Court must resort to the law it is engaged in administering, as furnishing the rule for its guidance.

Some points are made as to the admissibility of the testimony of Hoyt, Bagley, and Orr; but as no exceptions were reserved to the rulings of the Court admitting the testimony, they cannot, as has been frequently held, be considered in this Court.

Judgment and order reversed and cause remanded for a new trial.

We concur: Sharpstein, J., Morrison, C. J.

IN BANK.

[Filed October 11, 1882.]

No. 10,771.

PEOPLE, RESPONDENT, vs. SING LUM, APPELLANT.

CRIMINAL LAW—ENTRY OF JUDGMENT—NUNC PRO TUNC ORDER—EXECUTION

—NEW TRIAL. Defendant was convicted of the crime of murder in the first degree. He made a motion for a new trial, which was denied. Afterward the trial Court pronounced judgment of death against him. Through some inadvertence in the Court below the judgment was not entered in the minutes of the Court. The defendant appealed to this Court from the order denying his motion for a new trial, and attempted to appeal from the judgment pronounced against him. On the hearing of the appeal this Court affirmed, on the merits, the order denying the new trial, and dismissed the appeal from the judgment because there was no judgment in the record. After the filing of the remittitur from this Court in the Court below, the Court made a *nunc pro tunc* order directing the judgment to be entered on the minutes as of the date of its rendition, and it was so entered. The defendant excepted to the action of the Court, and asked to be permitted to move for a new trial on certain specified grounds. This motion the Court refused to entertain, because one such motion had already been made and determined. Thereupon the Court made an order fixing the day for the execution of the judgment. *Held*, there was no error in refusing to entertain the second motion for a new trial.

—PRESENCE OF DEFENDANT IN COURT—BILL OF EXCEPTIONS—APPEAL—PROMOTION. A defendant is entitled to be present in Court when the order for his execution is made. But in this case it does not appear from the record that he was not present, and in support of the regularity of the proceedings of the Court below, the presumption is indulged that he was.

—It defendant was not personally present, the bill of exceptions ought to have said so. Presuming that he was present, if there were any facts needing inquiry by the Court, he ought to have presented them. The purpose of Section 1227 of the Penal Code is in the nature of an order to show cause; and where any reason exists why the judgment of the Court should not be executed, it is the duty of the defendant when brought into Court to present it.

Appeal from Superior Court, San Francisco.

Darwin & Murphy, for appellant.

Attorney-General Hart, for respondent.

Ross J., delivered the opinion of the Court:

The defendant was convicted of the crime of murder in the first degree. He made a motion for a new trial, which was denied. Afterwards the trial Court pronounced judgment of death against him. Through some inadvertence in the Court below the judgment was not entered in the minutes of the Court. The defendant appealed to this Court from the order denying his motion for a new trial and attempted to appeal from the judgment pronounced against him. On the

hearing of the appeal this Court affirmed, on the merits, the order denying the new trial, and dismissed the appeal from the judgment because there was no judgment in the record. After the filing of the remittitur from this Court in the Court below, that Court made a *nunc pro tunc* order directing the judgment to be entered in the minutes as of the date of its rendition; and it was so entered. The defendant excepted to this action of the Court, and asked to be permitted to move for a new trial on certain specified grounds. This motion the Court refused to entertain, because one such motion had already been made and determined. Thereupon the Court made an order fixing the day for the execution of the judgment.

It is claimed on the part of defendant that he was entitled to be present when the order for his execution was made. So he was. (Sec. 1227, Penal Code; *People vs. Sprague*, 54 Cal. 92.) But it does not appear from the record that he was *not* present, and in support of the regularity of the proceedings of the Court below the presumption is indulged that he was. The bill of exceptions recites: "Be it also remembered that after the order of the entry of the said judgment *nunc pro tunc*, and before the order made that the Sheriff execute the judgment on the second day of September, 1881, the Court did not call on the defendant for any legal reasons against the execution of said judgment, and did not inquire into the facts, nor into any facts, but made said order without giving defendant any opportunity to show any cause against the same, and no cause was shown against the said order, nor passed upon by said Court, and that the defendant, by his attorney, then and there excepted to said order, and all parts of the same, and his said exceptions were duly allowed." If the defendant was not personally present, the bill of exceptions ought to have said so. Presuming, as we must, that he *was* present, if there were any facts needing inquiry by the Court, he ought to have presented them. The purpose of Section 1227 of the Penal Code is in the nature of an order to show cause, and where any reason exists why the judgment of the Court should not be executed, it is the duty of the defendant, when brought into Court, to present it. The record discloses no offer on his part to show any such cause. There was no error on the part of the Court in refusing to entertain a second motion for a new trial.

Judgment and order affirmed.

We concur: Morrison, C. J., Sharpstein, J., Myrick, J. McKinstrey, J., Thornton, J., McKee, J.

IN BANK.

[Filed October 12, 1882.]

No. 6208.

CROSBY, RESPONDENT, vs. DOWD ET AL., APPELLANTS.

STATUTE OF LIMITATIONS—INFANT—EJECTMENT—ADMINISTRATOR. After title has descended to an infant, against whose ancestor there had been no adverse holding, the infant has five years after attaining majority within which to maintain ejectment (C. C. P., 328), notwithstanding there had been an administrator of the estate of her ancestor during a portion of the period of her infancy.

Id.—Id. If it be true, as it undoubtedly is, under the above section, that had plaintiff's possession of the premises been invaded the day the title thereto first descended to her—when she was less than two months old—the time elapsing between the ouster and the attainment of her majority could not have been deemed any portion of the time limited for the commencement of an action by her for the recovery of the possession but that she would have been allowed the period of five years after the removal of her disability within which to have commenced such action, no reason is perceived why the same is not also true where the adverse entry takes place on any other day during the existence of the disability. Precisely the same reasons for the protection intended by the law exist in the one case as in the other, and where the protection once attaches it continues until the disability is removed.

Id.—MORTGAGE—DECREE—COMPLAINT—DESCRIPTION—DEED. Another defense relied on to defeat the action is title claimed to have been acquired under certain foreclosure proceedings in *Overfelt vs. Crosby*. *Held*, defendants acquired no title under such proceedings. The only description of the property directed to be sold is such as may be found in three certain deeds, to which reference is made. Neither in the decree, in the complaint nor in the mortgage itself is there any pretense of a description of the property, but only a reference to certain deeds for a description. Assuming that the deeds could be found, or, in the event that they could not be found, that reference could be made to the record of them, the descriptive calls there found might prove, on examination, to be wholly indefinite, or so vague as to leave it doubtful what lands they included.

Id.—Id. The primary purpose of an action of foreclosure is to enforce a lien upon certain specific premises. The first step in that proceeding, under our system, is the filing of a complaint. That complaint must contain a description *prima facie* at least sufficient for the identification of the property. There must be such a basis for the decree that is to follow, to rest on. While it is generally sufficient to describe the premises as they appear in the mortgage itself, this is only so when the mortgage itself contains a description—not where, as here, the mortgage contains no description, but only a reference therefor to other instruments, from which a description may or may not be obtained. If the description contained in the mortgage involved in *Overfelt vs. Crosby* was susceptible of being made definite and certain, that ought to have been done in the action foreclosing the mortgage. The decree should have put an end to all such uncertainties, and should have described the land directed to be sold with sufficient certainty for its identification. The degree of certainty sufficient in a deed of convey-

ance, would often be insufficient in a legal process, because in the former an indefinite description may be made good by evidence *aliunde*.

Id.—Id. There is as much necessity for a description of the property sought to be charged with a lien as there is in a case the object of which is to recover possession of the property; and as much necessity for a description in the decree as in the complaint.

Id.—TENANCY IN COMMON. Whether plaintiff could recover the entire premises if defendant Clarke had by adverse possession extinguished the title of the plaintiff's co-tenant, and himself thereby acquired title to the interest theretofore owned by the co-tenant, is a question that need not be considered in this case, since it does not appear, either in the findings or proof, that Clarke has ever held adverse possession to the premises as against the plaintiff's co-tenant.

Appeal from Twentieth District Court, Santa Clara County.

Houghton & Reynolds, and Stanley, Stoney & Hayes, for appellants.

Lieb, McAllister & Bergin, and Birch, for respondent.

Ross, J., delivered the opinion of the Court:

The action is ejectment and the premises a part of a Mexican grant, for which a patent was issued by the United States Government on the 19th day of February, 1868. The plaintiff is the daughter and one of the heirs of S. J. Crosby, deceased. Crosby owned the land at the time of his death, which occurred March 29, 1859. When he died his daughter was but a little more than a month old. Crosby's possession of the property was not invaded during his lifetime. Had it been, and had the statute of limitations been set in motion during that period, its running would not, of course, have been arrested by the subsequent disability of the plaintiff. But this was not the case. When Crosby died, his title to an undivided interest in the property descended to, and vested in the plaintiff. She then became, with her co-tenant, entitled to its possession. But she was then a minor, incapable of vindicating or asserting her right. Around her, therefore, the law threw its protection. If there had then been an invasion of her possession there can be no doubt that she would have been entitled to the statutory period of five years after attaining her majority within which to have asserted her right by action. (Code of Civil Procedure, Section 328.) With the descent of the title came the protection of the law. What removed that protection? It is said that subsequent administration upon the estate of the ancestor did so. Administration upon that estate was had, although the precise date when it was commenced does not appear. Letters of administration were, however, issued to

one Reed prior to the year 1860. Reed tendered his resignation of the office June 28, 1860, and it was accepted on the 11th of August of the same year. Beach succeeded Reed as administrator by appointment made May 8, 1866, and he resigned April 2, 1870. From April 2, 1870, to January 3, 1876, there was no administrator; but upon the last named day one Smith was appointed. During all this time the plaintiff continued a minor. What is relied on by the appellant as adverse possession of the premises commenced in the year 1866. The patent, as already said, issued February 19, 1868. At both of the last mentioned dates there was an administrator of the estate of S. J. Crosby, deceased, in office, and the appellant's claim is, that, as under our law, the administrator alone was then entitled to the possession of the property, it was his right alone, as well as his duty, to have commenced an action for the recovery of the possession from the adverse possessor; that the statute of limitation commenced to run upon the issuance of the patent, and five years thereafter all rights on the part of the administrator, as well as of the infant heir of Crosby, became barred. If such is the necessary result of the provisions of law, it is a hard result, as must be apparent to every one. There is no provision of law requiring the administrator to give security based upon the value of the real property of the deceased.

Under the law in existence when the alleged ouster in this case occurred, and when it is claimed the statute of limitations began to run, the sole right to the possession of the property was in the administrator; and prior to January 1, 1873, the heir could not maintain an action for the recovery of the possession of the property, even though there was a vacancy in the administration. (*Chapman vs. Hollister*, 42 Cal. 462.) So that the result of appellant's position would be to divest the title of an infant heir by means of an adverse possession, commenced and held at a time when the heir was not only incapable of asserting her rights by reason of infancy, but was absolutely prohibited by law from asserting them, and when, too, there was no one in existence charged with the right or duty of protecting them. The circumstances of the present case will illustrate the wrong that would result from such a construction of the law.

At the time it is claimed the statute of limitation began to run—February 19, 1868—the plaintiff was less than ten years old. It is true there was an administrator of the estate of her ancestor, in the person of Beach, and that he could have commenced and maintained an action against the in-

truder for the possession of the property. But on the 2d of April, 1870, a vacancy in the administration occurred, and that vacancy continued until after the lapse of five years from the 19th of February, 1868. During this time there was no one in existence capable of bringing the action. There was no administrator, and the plaintiff was not only disqualified by reason of her minority, but she was prohibited by law from doing so. She was likewise legally incompetent to cause the appointment of an administrator to represent the estate, as well as to compel action, if there had been one. It would be a law with very little justice in it that would permit an infant's property to be divested by adverse possession held under such circumstances. Fortunately, we are convinced, after careful consideration, that the terms of our statute do not compel us to so hold. Engrafted upon the provisions prescribing the time of commencement of actions for the recovery of real property is an exception in these words: "If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof; or to make any entry or defense founded on the title of real property, or to rents or services out of the same, be, at the time such title first descends or accrues, either:

"1. Within the age of majority; or 2. * * *

"The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period." (Section 328, Code of Civil Procedure.)

If it be true, as it undoubtedly is, that had the plaintiff's possession of the premises been invaded the day the title thereto first descended to her—when she was less than two months old—the time elapsing between the ouster and the attainment of her majority could not have been deemed any portion of the time limited for the commencement of an action by her for the recovery of the possession, but that she would have been allowed the period of five years after the removal of her disability within which to have commenced such action, no reason is perceived why the same is not also true where the adverse entry takes place on any other day during the existence of the disability. Precisely the same reasons for the protection intended by the law exist in the one case as in the other, and we are persuaded that where

the protection once attaches it continues until the disability is removed.

Our conclusion on this branch of the case is strengthened by the consideration of other provisions of our statutes.

As observed already, prior to January 1, 1873, the heir was prohibited by statute from maintaining an action for the recovery of the possession of the property (the title to which was in her), pending administration upon the estate of an ancestor, and this, though there was a vacancy in the administration. Yet the statute in prescribing the requirements of the administrator's bond, made no provision for security on his part for the protection of the interest of the heir in the real property of the estate. It is not to be supposed that had the Legislature intended the statute of limitations to run against the title of the heir, whom it prohibited from suing for the possession, because it conferred on the administrator that right temporarily, would not have required of the administrator adequate security for the protection of the rights of the heir.

A further statutory provision in support of the same view is found in Section 356 of the Code of Civil Procedure, which reads:

"When the commencement of an action is stayed by injunction or statutory prohibition, time of the continuance of the injunction or prohibition is no part of the time limited for the commencement of the action."

The statutory prohibition against the maintenance by the heir of an action for the recovery of the real property of the estate was removed January 1, 1873, by the taking effect of the Codes. Section 1452 of the Code of Civil Procedure, providing that "the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, except against anyone except the executor or administrator," and on April 16, 1880, this section was amended by adding the words: "But this section shall not be so construed as requiring them so to do."

Even if it could be held that the statute of limitations commenced running against the plaintiff on the 1st of January, 1873, when the statute for the first time conferred upon her the right to maintain an action for the recovery of the property, it had not fully run on the 21st of April, 1877, when the present action was commenced. But, for the reasons already stated, we are satisfied that the plaintiff's rights were saved by the provisions of Section 328 of the Code of Civil Procedure, and that she was lawfully entitled

to the period of five years after attaining her majority within which to assert them.

Another defense relied on to defeat this action is title claimed to have been acquired by the defendant through certain foreclosure proceedings. The land directed to be sold is thus described in the decree of foreclosure, as also in the complaint in the action and in the mortgage itself:

"All of that part of the rancho situated in the county of Santa Clara, in the State of California, called the Santa Rita, described in the three following deeds, to wit: In a deed dated February 15, 1855, from Secundino Robles and Antonia Garcia, his wife, Miguel Espinosa, Jesus Robles, his wife, to Samuel J. Crosby, filed for record in the County Recorder's office of Santa Clara County, on the sixteenth day of February, 1855, and recorded in Book 'H' of Deeds, page 405, and re-recorded March 10, 1855, and in Book 'G' of Deeds, page 477; also, a deed dated May 5, 1855, from one Teodoro de Jesus Robles to Samuel J. Crosby, filed for record in said Recorder's office May 7, 1855, and recorded in Book 'G' of Deeds, page 509; and also, a deed dated this tenth day of March, 1856, from Don Teodoro de Jesus Robles to Samuel J. Crosby, filed for record in said Recorder's office on the eleventh day of March, 1856, and recorded in Book 'K' of Deeds, page 188, to which deeds reference is made for a more particular description of the premises."

It will be thus seen that the only description of the property directed to be sold is such as may be found in three certain deeds, to which reference is made. Neither in the decree, in the complaint, nor in the mortgage itself is there any pretense of a description of the property, but only a reference to certain deeds for a description. Assuming that the deeds could be found, or, in the event that they could not be found, that reference could be made to the *record* of them, the descriptive calls there found might prove, on examination, to be wholly indefinite, or so vague as to leave it doubtful what lands they included.

The primary purpose of an action of foreclosure is to enforce a lien upon certain specific premises. The first step in that proceeding, under our system, is the filing of a complaint. That complaint must contain a description *prima facie* at least sufficient for the identification of the property. There must be such a basis for the decree that is to follow, to rest on. While it is generally sufficient to describe the premises as they appear in the mortgage itself, this is only so when the mortgage itself contains a description—not

where, as here, the mortgage contains no description, but only a reference therefor to other instruments, from which a description may or may not be obtained. (2 Jones on Mortgages, Section 1462, and authorities there cited.) If the description contained in the mortgage involved in *Overfelt vs. Crosby* was susceptible of being made definite and certain, that ought to have been in the action foreclosing the mortgage. The decree should have put an end to all such uncertainties, and should have described the land directed to be sold with sufficient certainty for its identification. The degree of certainty sufficient in a deed of conveyance, would, as said by Chief Justice Shaw, in *Miller vs. Miller*, 16 Pick. 215, often be insufficient in a legal process, because in the former an indefinite description may be made good by evidence *aliunde*.

In *Clark vs. Gage*, 19 Mich. 507, which was a proceeding instituted to recover the possession of land in a summary manner, pursuant to the statutes of the State, the Court referred to the cases of *Miller vs. Miller*, *supra*, *Atwood vs. Atwood*, 22 Pick. 283, and *F'lagg vs. Bean*, 5 Foster (N. H.) 49, and said: "Without adopting the extreme view that the description required in a complaint should be so explicit as to enable the Sheriff to deliver possession without reference to any extrinsic facts, it is believed that the principle pervading these cases is a clear and correct authority for holding that the certainty requisite in a complaint in this class of cases is not attained by a bare reference to a deed or other instrument, and further, that such reference when made will not have the effect to help an otherwise insufficient description. It is not possible to define with perfect exactness the kind of description which will suffice in all cases, but it may be stated as a general rule that it should be so precise as *prima facie* to give to the defendant who is to answer to the complaint, the tribunal appointed by law to decide upon it, and the officer who may be required to put a complainant in possession, a distinct idea of the very premises. The degree of precision which is here indicated may be attained, and yet from the nature of the subject-matter and its surrounding objects, the officer on executing a writ of restitution or possession may find it necessary to instruct himself in local circumstances in order to act correctly. But any necessity of that kind would result from unavoidable difficulties belonging to the subject matter, and not from any defect in the proceedings on paper."

There is as much necessity for a description of the property sought to be charged with a lien as there is in a

case the object of which is to recover possession of the property; and as much necessity for a description in the decree as in the complaint. (See also Freeman on Judgments, Section 54; *Lawler vs. Boyer*, 9 Bush (Ky.), 665; 10 Id. 67; *Strubble vs. Neighbert*, 41 Ind. 344.)

Our conclusion is that the defendants acquired no title under the foreclosure proceedings of *Overfelt vs. Crosby*.

Whether plaintiff could recover the entire premises if defendant Clark had by adverse possession extinguished the title of the plaintiff's co-tenant, and himself thereby acquired title to the interest theretofore owned by the co-tenant, is a question that need not be considered in this case, since it does not appear, either in the findings or proof, that Clark has ever held adverse possession of the premises as against the plaintiff's co-tenant.

The bill of exceptions recites:

"The only evidence in addition to the documentary evidence upon which the findings are based as to the adverse possession of the defendant Clark, or as to any title or claim of title under which he held and occupied, was the following testimony of the defendant Jeremiah Clarke: The defendant Patrick Dowd entered into possession of that portion of the premises in dispute which was held in his possession at the commencement of this action under a lease from me about the first day of October, 1866, and he has remained in possession ever since. He has never surrendered the possession since his first entry under the lease from me. The description in the deeds referred to for description in the decree in *Overfelt vs. Crosby* embraces the same premises described in the Sheriff's deed to Overfelt, and all the premises sued for in this case, except the 'Mayfield Farm.' Previous to my purchase from Overfelt I had adverse possession of a portion of the land not in the possession of S. J. Crosby. My recollection does not serve me whether, in my transaction with the administration of Mr. Crosby's estate, I recognized the 80 acres which I had the possession of before and which was not in possession of Crosby in his lifetime, as part of the land for which I paid him rent or not. But all my relations with the administrator were perfectly friendly, and I never claimed adversely to anything he claimed. I paid him such rent as he proposed.

"The 80 acres spoken of was a piece that Mr. McGarrahan had in possession and kept Crosby out of. I received possession of this 80 acres from defendant Dowd in the fall of 1858. I do not recollect whether I took any written lease from Reed, the administrator of the Crosby estate, or not.

Nor do I recollect that anything was said about this 80 acres. It is very likely it was included in the lease from Reed, and that I paid him rent for it. I do not know that he or I thought about the 80 acres that McGarrahan and Dowd had held adversely to Crosby, the possession of which I received from Dowd. We simply agreed how much I was to pay, having reference to the time when possession should be taken under the Overfelt purchase."

Judgment and orders affirmed.

We concur: McKinstry, J., Morrison, C. J., Thornton, J., Myrick, J., Sharpstein, J.

DISSENTING OPINION.

I concur with the views expressed in the prevailing opinion upon the question of the statute of limitations; but I dissent from those expressed upon the subject of the description of the mortgaged premises in the decree of foreclosure. It is conceded that the description of the land in the mortgage, and in the foreclosure proceedings, was sufficient (*Vance vs. Fore*, 24 Cal. 435; *Penry vs. Richards*, 52 Id. 672; *Stanley vs. Green*, 12 Id. 148; *Caldwell vs. Center*, 30 Id. 539; *Kimball vs. Semple*, 25 Id. 440); and I do not understand how its transmission into the decree of foreclosure changed it into a nullity.

McKEE, J.

DEPARTMENT No. 2.

[Filed October 28, 1882.]

No. 7296.

VAN COURT, RESPONDENT,
vs.
WINTERSON, APPELLANT.

FINDINGS—NEW TRIAL—PRACTICE. A new trial is properly granted by the trial Court after judgment, because of a failure to find upon the issues as to which there had been no waiver.

Appeal from Superior Court, San Francisco.

T. V. O'Brien, for appellant.

M. Mullaney, for respondent.

By the COURT.

The Court below made an order (which was entered in the minutes) that judgment be entered in favor of defendant. Thereupon, the clerk entered judgment. Subsequently, the court, on motion of the defendant, ordered the judgment to be set aside and the cause restored to the calendar for trial,

for the reason that it appeared to the Court that no findings of fact were ever prepared, signed, or filed, and that findings were not waived.

We see no error in this. If the judgment had been appealed from, we would, in order to sustain the judgment, presume that findings had been filed or waived; but in this case that presumption is overcome by the statement in the bill of exceptions, that there were no findings and that findings had not been waived.

The orders are affirmed.

DEPARTMENT No. 2.

[Filed November 1, 1882.]

No. 7338.

FROMM, RESPONDENT,

VS.

THE SIERRA NEVADA SILVER MINING COMPANY,
APPELLANT.

CONVERSION—DAMAGES—ACTION—REASONABLE TIME—DILIGENCE. An action commenced fifty-eight days after conversion is "prosecuted with reasonable diligence," within the meaning of Section 3336, C. C.

Appeal from Superior Court, San Francisco.

Lloyd, Newlands & Wood, for appellant.

Taylor & Haight, for respondent.

By the COURT:

Section 3336 of the Civil Code is as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." * * *

The conversion in this case took place on the twenty-sixth day of March, 1879, and the action was brought on the twenty-third day of May, 1879. The only point made on the appeal is, that the action should have been brought at an earlier day. But we are of opinion that there was reasonable diligence in bringing the action within the meaning of the Code.

Judgment and order affirmed.

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Current Topics.

ARE PROBATE SALES ACTIONS IN REM?

In "Waples' Proceedings in Rem" we find the following: "It will not be understood, as taught, anywhere in this chapter, that probate sales of decedents' estates are 'proceedings in rem.' The sale of a thing is not an action against a thing. Nor will it be understood that probate judicial proceedings, whence issue orders of sale, are always *in rem*. If those proceedings are conducted contradictorily with persons, after citation, and the judgment is against them as defendants, the case is *in personam*." (Page 720.)

In California the Code requires notice to be given to "*all persons interested in the estate*" when the Court is asked to grant an order for the sale of realty belonging to the estate of a decedent. This notice may be served personally (if they are residents of the county) or by publication. The persons referred to as "*interested in the estate*" are *heirs, legatees and creditors* (37 Cal. 426). These are "*all the world*" to whom notice must be given in proceedings *in rem*. Jurisdiction over persons is not sought, but over the *res*. "Jurisdiction over the subject-matter is enough; but what is the subject-matter? It is the interest of one man in the *res*, if only one is notified; of two, if two are notified; of all men, if all are notified" (page 718). The Code requires notice to be given to all interested in the *res*, either by personal citation or by general notice. According to Waples a sale under the first kind of notice would be a proceeding *in personam*, while one under the second kind of notice would be a proceeding *in rem*. Is not the distinction rather fanciful? If all are

notified who have an interest in the *res*, jurisdiction of the *res* is obtained, and a "new title paramount" can be evolved from the probate proceedings.

IS THE PURCHASE OF CHATTELS BY ONE KNOWING HIMSELF TO BE INSOLVENT FRAUDULENT?

The answer to this question depends, in California, upon the answer to another question, viz., Did the insolvent do anything to deceive the vendor? In *Seligman vs. Kalkman*, 8 Cal. 207, it was held that from the two facts that the vendee was insolvent and knew of his insolvency, there was presumed a fraudulent intention. In *Bell vs. Ellis*, 33 Cal. 620, this doctrine was overruled, and it was held that a buyer is not bound to disclose his insolvency if he is not asked to do so; and if he does not, and is not asked to do so, the mere fact that he is insolvent, and knows of his insolvency, will not render the sale void.

In a recent decision (*Oswego Starch Factory vs. Lendrum*, 2 Iowa Supreme Court Transcript, 573,) the Supreme Court of Iowa held a sale fraudulent when the only facts before the Court were the insolvency of the vendee and his knowledge of this fact. The case came up on a demurrer to the complaint, which alleged the insolvency of the vendee, the vendee's knowledge of this insolvency, and the intention of the vendee to defraud the vendor, but contained no allegation of any facts upon which this allegation of intention was based. The Court overruled the demurrer. We submit that the two Courts are at variance on this question.

ANOTHER FORT TAKEN.

One by one the States are falling into line in regard to woman's admission to the Bar. Connecticut is the last heard from. If she can plead, why not let her judge? If a woman should be promoted to the Bench, how would she evade the democratic prejudice against the wearing of *gowns* by Judges? Will some female brother in law please answer?

Supreme Court of California.

IN BANK.

[Filed October 30, 1882.]

No. 8420.

COUNTY OF SACRAMENTO, APPELLANT,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
RESPONDENT.

STATE TAXES—ACTION—ATTORNEY-GENERAL—DISTRICT ATTORNEYS. The Attorney-General, by virtue of his supervisory power over the District Attorneys, may assume the direction and control of an action brought under the Act of April 23, 1880 (Stats. 1880, p. 136), "prescribing the form of complaint in actions to recover delinquent taxes, and to authorize the bringing of suit therefor."

Id.—JUDGMENT—CLERK. In an action under the above Act, the Clerk of the Supreme Court has no power (without an order of Court) to enter a judgment for a single sum which is less than the amount alleged in the complaint to be due for State tax, county tax, penalties, etc.

Id.—DEBT. A State tax duly levied, becomes a judgment upon which an action, in the nature of an action in debt, will lie.

Id.—APPEAL.—ORDER. The order denying the application of the Attorney-General was an order made after judgment and is appealable.

Id.—BILL OF EXCEPTIONS. Section 650, C. C. P., relates to exceptions "taken at a trial;" the exception here was taken after trial and judgment.

Appeal from Superior Court, Sacramento County.

Attorney-General Hart, for appellant.

T. B. McFarland, for respondent.

McKINSTY, J., delivered the opinion of the Court:

1. The Attorney-General, by virtue of his supervisory power over the District Attorneys, may assume the direction and control of an action brought under the Act of April 29, 1880, "prescribing the form of complaint in actions to recover delinquent taxes, and to authorize the bringing of suits therefor."

2. In an action under the Act referred to, the Clerk of the Superior Court has no power (without an order of Court) to enter a judgment for a single sum which is less than the amount alleged in the complaint to be due for the State tax, county tax, penalties, etc.

It is claimed by respondent that the judgment appealed

from was entered in compliance with Section 997 of the Code of Civil Procedure, which reads as follows:

"The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the money or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in the evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay defendant's costs from the time of the offer."

The appeal is from the judgment and from the order of the Superior Court denying the motion of the Attorney-General to set aside the judgment.

1. The Court below held that the Attorney-General was not authorized to make the motion, and that the judgment had been properly entered.

This Court has already held that the Attorney-General had the right to control the action in the Court below, and to appeal from the judgment. (*County of Sacramento vs. The Central Pacific Railroad Company*, 10 Pac. C. L. J. 27.)

The Act of April 23, 1880 (Statutes 1880, p. 136), authorizes an action for State as well as county taxes, to be brought by the District Attorney in the name of the county. This Act, and the sections of the Political Code relating to the duties of District Attorneys, are to be construed as *in pari materia*. The District Attorney is directed to prosecute all actions for the recovery of "debts" accruing to the State or to his county. (Political Code, Sec. 4256.) It was said in *Perry vs. Washburn*, 20 Cal. 318, that State taxes are not "debts" within the meaning of the Act of Congress, which made "United States notes" a legal tender "for all debts public or private." We entertain no doubt of the correctness of this construction of the words of the Act of Congress. When speaking of *taxes*, the Act refers only to taxes levied by the United States, and by its terms the Act distinguishes between "taxes" and "debts." But by our law, a State tax duly levied, becomes a judgment upon which an action, in the nature of an action *in debt*, will lie. Certainly, in a popular sense, a tax duly levied becomes a liquidated demand or *debt*, due from the owner of the property taxed to the State. It is in this sense that the word has been employed in the legislation we are consider-

ing. The form of complaint furnished by the Act of April 23, 1880, commences: "Plaintiff avers that defendant is indebted," etc. The language here used would not of itself, perhaps, make a delinquent tax a technical "debt," but by it the demand upon the defendant sued is, in effect, *called* an indebtedness. The Legislature has authorized the District Attorneys to sue for debts due the State or county, and has authorized a suit for taxes to be commenced by a complaint in which a tax is said to have created a debt.

The District Attorney had the power to commence and prosecute the action, subject to the supervision of the Attorney-General. (Pol. Code, 470.) The last named officer has power, whenever in his opinion the public service requires it, to "assist" the District Attorney. (Id.) When he thus assists the District Attorney, he may, by virtue of his "supervisory power over the District Attorneys in all matters pertaining to the duties of their offices," assume a paramount control and direction of the business he and the District Attorney are jointly conducting.

When, therefore, it appeared that the District Attorney, without consultation with the Attorney-General, had accepted the offer of defendant to allow a judgment to be taken for less than the amount of taxes sued for, the Court below, upon the application of the Attorney-General, should have permitted that officer to withdraw the acceptance, and should have set aside the judgment based upon it, together with the satisfaction thereof. The Court should have taken judicial notice of the supervisory control of the Attorney-General, and of the limitations upon the power of the District Attorney implied by such supervision.

The order denying the application of the Attorney-General was an order made after judgment, and is appealable.

It is urged that the bill of exceptions cannot be considered here because not settled as required by Section 650 of the Code of Civil Procedure. But Section 650 relates to exceptions "taken at a trial;" the exception here was taken after trial and judgment.

2. The judgment must be reversed, because the Clerk of the Superior Court had no power to enter it. It has been held very often that, in entering a judgment without an order of Court, the Clerk of the District (or Superior) Court acts ministerially, employing no judicial discretion. (*Gray vs. Palmer*, 28 Cal. 416; *Leese vs. Clark*, Id. 33; *Crane vs. Irshfelder*, 17 Id. 582; *Wilson vs. Cleveland*, 30 Id. 192; *Vallace vs. Eldredge*, 27 Id. 495; *Kelly vs. Van Austin*, 17 l. 564.)

While the District Attorney in his official capacity (subject under certain limitations to the direction of the Attorney-General), was authorized to prosecute an action on behalf of the State and county, in the name of the county, for the amounts of taxes due the State and county respectively, the defendant and clerk of the Superior Court were bound to know the extent of the powers of the District Attorney with respect to the collection of State taxes. The assessment of the State tax could only be made by the State Board of Equalization, and after the tax upon railroad property had been apportioned as required by the Constitution (Article XIII, Section 10), there was no power in any officer or Board, except, perhaps, the State Board of Equalization, to reduce the amount apportioned to any county. The District Attorney, by accepting an offer "to allow a judgment" for less than the amount fixed by the State Board, could not estop the State from claiming such amount. The rule of presumption as to the authority of an attorney has no application to a public officer whose powers and duties are defined by law, and therefore exactly understood by all parties concerned. As was said by the Supreme Court of Nevada: "To presume that he (the District Attorney) has a special authority to compromise a claim for delinquent taxes is to presume a fact which is legally impossible." (*State vs. Cal. M. Company*, 15 Nev. 299.)

It may be said, however, that in presence of the written "offer" and its acceptance by the District Attorney, we are bound to presume the amount due from defendant was the amount named in the offer and for which judgment was rendered; in other words, that plaintiff sued for more than the amount of taxes due and recovered the amount actually due.

But, as we have seen, the county, so far as the State tax is concerned, is but the nominal party. As to such tax, the State is the real party in interest. It is the State suing in the name of the county. The complaint herein, following the statutory form, alleges that defendant is indebted to plaintiff in the sum of \$10,711.25 for "county taxes," etc., and (in another and separate averment) that defendant is indebted to plaintiff in the further sum of \$6,713.75 "for State taxes," etc. The "general nature of the action" is described in the *summons* as being to "obtain a judgment for the sum of \$10,711.25 for county taxes * * * and for the further sum of \$6,713.75 for State taxes," etc. The prayer of the complaint as prescribed by the statute is as follows: "Wherefore, plaintiff prays judgment for said several sums," etc.

It was the evident understanding of the District Attorney, when the action was commenced—and in his view of the meaning of the statute we believe him to have been correct—that the Legislature intended the judgment should specify the several sums for which it should be rendered for State and county taxes respectively.

The proceeding is special and statutory, and, without deciding whether the Superior Court would have jurisdiction in this action to render a judgment in a gross sum less than the aggregate claimed for State and county taxes, we hold that the clerk had no power to enter the judgment which was entered.

It is true that the statute of 1880 does not in terms prescribe the form of judgment to be entered in actions brought under it. But it does prescribe the form of complaint, the prayer of which—read in connection with the averments of separate indebtedness to the State and county—clearly indicates the intention that the judgment should specify the amount due each. The judgment before us is for a less sum than the aggregate amount claimed for State and county taxes. How much of the sum named in the judgment has been decreed to the State, how much to the county? The statute commands a judgment, by way of penalty, of five per centum upon the amount of State tax found due, and of the same per centage upon the amount of county tax. What proportion of the gross sum named in this judgment is for such penalties, or either of them? The statute does not make the county the trustee of the State, nor contemplate further litigation between the State and county in case the latter shall retain more than may be deemed to be its just share of a judgment for taxes when collected. The statute authorizes the District Attorney—under the supervision of the Attorney-General—to bring an action for the State in the name of the county, and to join with it an action for the county. True, the State tax, when collected, is transferred to the State Treasury through the appropriate county officers. But such is the case with reference to State taxes however collected. Our statute books contain many laws imposing upon county officers duties to be discharged to the State, especially with reference to the matter of the assessment and collection of taxes. With respect to such duties the officers are agents of the State. Thus by the Act of 1880, the Attorney-General and District Attorney in prosecuting the action therein provided for, both act for the State, so far as the State tax is concerned. In respect to such tax the county supervisors, as such, have no control of

the litigation. These considerations would satisfy us that the judgment to be rendered in an action prosecuted under the Act of 1880, must declare specially and separately the sum recovered for State and county taxes, even if the language of the statute were ambiguous. It is barely possible that we would *construe* a judgment of the Superior Court for an amount exactly equal in the aggregate to the sums claimed for State and county taxes, together with a five per cent. penalty, and interest upon such sums as a judgment for the sums claimed for State and county taxes, etc. But certainly the *clerk* has no power to enter a judgment in a general sum *less* than the aggregate amount claimed for State and county taxes, penalties and interest. It will be observed that the "offer" recited in the judgment, and upon the acceptance of which by the District Attorney the judgment is based, is an offer to allow plaintiff to take a general judgment for \$9,374.87. The general judgment not only fails to comply with the form required by the statute, but totally fails to accomplish the purpose for which the statute was passed, since it cannot be ascertained from such judgment what sum has been found due the State, or what sum has been found due to the county.

To put a like proposition in different words the "complaint" required by Act of 1880 will not uphold a judgment for a gross sum less than the amount of the sums claimed to be due for State and county taxes, etc.

It will be said that Section 997 of the Code of Civil Procedure only provides for an offer to allow judgment "for the sum therein specified. Having shown that the only judgment which can properly be entered in an action brought under the law of 1880, is a judgment specifying the particular sum due the State and the particular sum due the county, if it were true that the only "offer" permitted by Section 997 of the Code of Civil Procedure is an offer to allow a judgment in a single sum, it would follow that an offer under Section 997 was totally inapplicable to an action under the Act of 1880, and, as a consequence, the clerk had no authority to enter a judgment based upon such an offer. But it is not necessary to our purpose so to hold. It may be admitted that where, as under the Act of 1880, the action is brought to recover several sums to be specified in the judgment, an offer might be made (under Section 997) to allow judgment for one of such sums, or for sums less than the respective sums claimed in the complaint. But it necessarily follows from what has been said with reference to the form of the judgment, that, to authorize the clerk to enter a judgment for

the amounts named in the offer, the offer must specify in what sum judgment will be allowed for State, and in what sum for county taxes.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: McKee, J., Sharpstein, J., Morrison, C. J., Ross, J., Myrick, J., Thornton, J.

IN BANK.

[Filed November 9, 1882.]

No. 7166.

PRIET, APPELLANT,

VS.

HUBERT ET AL., RESPONDENTS.

DUPONT STREET COMMISSIONERS—WARRANT—TREASURER—SAN FRANCISCO—STREET—PAYMENT. Action brought under the fifteenth section of an Act to authorize the widening of Dupont street, San Francisco. (Stats. 1875-6, p. 433.) Hunter, one of the defendants, was owner of a lot, and plaintiff had a leasehold interest therein. The Dupont Street Commissioners assessed the damages for the lot at \$10,932, in favor of Hunter "and to all owners and claimants known and unknown." A warrant (No. 92) was drawn on the Dupont Street Fund in favor of Hunter for the \$10,932 and endorsed to one Tibbey, as in opinion stated. Afterward the Board, finding that there was a lease of said lot and a doubt or dispute about the value thereof, and of any damages to the leasehold interest caused by the widening of the street, drew another warrant (No. 114)—the warrant in controversy—payable out of the Dupont Street Fund, for the same amount of \$10,932, for which 92 had been drawn and awarded to the lot of land, and deposited the same with defendant Reynolds, County Clerk, and notified defendant Hubert, Treasurer, of the drawing and deposit thereof and of the description of the lot covered by said warrant 114. Afterward Hubert paid the \$10,932 on warrant 92 to Tibbey. The Court below held that warrant 92 was paid to Hunter and received by his authorized agent, in the sum of \$10,932, in full satisfaction of the award; that there was no consideration for the issuing of warrant 114; that the latter was extinguished by the payment of the former, and denied relief as against defendants Hubert, Treasurer, and Reynolds, County Clerk. *Held*, on appeal: If the finding that warrant No. 92 was delivered to and left with Tibbey (Secretary of the Dupont Street Commissioners) by defendant Hunter, "with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer, and collect and receive from him the amount expressed therein," means that there was an actual agreement between Hunter and Tibbey to the effect that the latter should collect the warrant, either for himself or for Hunter, the evidence does not support the finding. The evidence clearly shows that the warrant was to be left with Tibbey, "to be placed in the hands of the County Clerk" until such time as the dispute between defendant Hunter and the plaintiff should be determined.

- Id.—Id. The evidence shows beyond dispute that the defendant (Hubert) paid to Tibbey the sum called for by warrant 92 in violation of his official duty, and with full knowledge that 92 represented the amount of damages allowed for the property to which the plaintiff asserted a claim, and that he paid 92 with the money which he himself had set aside for the payment of 114, then on deposit with the County Clerk to await the determination of this action.
- Id.—Id.—PAYMENT. The payment to Tibbey of the money which should have been reserved for distribution in accordance with the decree herein, was, under the circumstances, no more a payment to Hunter than would have been a payment of a sum to a stranger, or an appropriation of it by the Treasurer himself.
- Id.—Id.—NOTE. "To avoid any possible misapprehension, it is proper here to say that the payment was made by a deputy of the Treasurer, and not by that officer personally."
- Id.—Id. Plaintiff, who is entitled to an interest in warrant 114, and in the proceeds thereof, to the extent of \$1,650, could not be deprived of his claim against the treasury by the circumstance that the County Treasurer had paid a like sum to another person upon another warrant. Plaintiff had no connection with the receipt for, or endorsement of warrant 92 by defendant Hunter, nor did the law make the latter the agent of plaintiff to receive any warrant awarded to property in which plaintiff was interested. Plaintiff had no interest in 92, or in any other warrant than 114, the only warrant deposited with the County Clerk.
- Id.—Id.—DECREE. The decree of the Court below should have adjudicated the conflicting claims of plaintiff, as lessee, and of defendant, Hunter, as lessor, in warrant 114, and have provided "for its just and proper distribution." (Sec. 15.)

Appeal from Twelfth District Court, San Francisco.

Gallagher, Whittemore, and Tilden, for appellant.

Cowdery, Murphy, and Burnett, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

The action was brought under the fifteenth section of an Act to authorize the "widening of Dupont street." (Statutes 1875-76, p. 433.) The section reads:

"In all cases, when the owner or owners of any subdivision of land taken for the widening of said street, or of any improvements destroyed or injured, is or are unknown or is or are known to be laboring under any legal disability, and in cases where there are liens or incumbrances, or leases or conflicting claims or disputes or doubts about the title of any lot or subdivision of land, which cannot be adjusted between the parties in interest, in all such cases it shall be the duty of the Board of Commissioners to draw a warrant on the Treasurer of said city and county, payable out of said Dupont Street Fund, for the amount awarded in each case as the value of the respective lots of land taken for said street, or for damages awarded on account of improvements destroyed or injured by reason of the widening thereof, as fixed in said

report, and to deposit said warrant with the County Clerk of said city and county; and thereupon, and on proof of the same, the said Board shall be entitled to be put in possession of the same such lots of land as shall be taken for said street, in the same manner as provided in Section 16 of this Act, and the title to said lots of land shall thenceforth be vested in said city and county as effectually as if the same had been conveyed by deed executed by the true owners thereof. Said Board shall also notify the said Treasurer of the drawing of said warrant, and furnish him with a description of the lot referred to by said warrant; and the parties in interest in said lot may proceed against the Treasurer by bill in equity for an adjudication to settle the conflicting claims to the same, or to provide for its just and proper distribution, in which suit all parties in interest or dispute shall be made parties, if known. On entry of a final decree of Court in such action, the said County Clerk shall deliver the warrant to the party or parties entitled thereto, according to the order of the Court. The only requisition upon the Treasurer shall be to answer whether he has the money in the 'Dupont Street Fund' to pay the warrant when presented."

The Court below found that the Dupont Street Commissioners assessed the damages for the lot described in the complaint at \$10,932, and assessed the same in favor of David Hunter, one of defendants, "and to all owners and claimants, known and unknown."

The Court also found "that on the twentieth day of April, 1877, the Board of Dupont Street Commissioners drew a warrant, such as was provided for in such cases by said Act of the Legislature, in favor of said David Hunter, for said sum of \$10,932 gold coin, payable out of the Dupont Street Fund, provided for in said Act, and being for the award and assessment aforesaid, which warrant was numbered ninety-two (92), and was in the words and figures as set out by copy in the amended answer of defendants, Hubert, Treasurer, and Reynolds, County Clerk of the city and county of San Francisco, filed herein on the eighteenth day of September, 1879, and was signed by the President and countersigned by the Secretary of said Board, as were all other warrants ever drawn by that Board, and endorsed as follows, viz: 'No. 92, \$10,932. Warrant on Dupont Street Fund, in favor of D. Hunter.'

"That afterwards, on the twenty-seventh day of April, 1877, said defendant, Hunter, endorsed said warrant No. 92 as follows, viz: 'David Hunter,' which endorsement was witnessed in writing, as follows, viz: 'Endorsement correct.

H. S. Tibbey; and at the same time last aforesaid, said Hunter further endorsed said warrant No. 92 as follows, viz: 'Received payment, David Hunter'; which endorsement last aforesaid was then, and had been for years last preceding that time, and still is, the usual endorsement acknowledging receipt of money due upon warrants upon the treasury of said city and county of San Francisco.

"That at the time last aforesaid, said warrant No. 92 was delivered to said Hunter, and by him delivered to and left with one Henry S. Tibbey, with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer, as aforesaid, and collect and receive from him the amount expressed therein of \$10,932, gold coin.

"That afterwards, on the ninth day of July, 1877, said Board found that there was the said lease of said lot, and a doubt or dispute about the value thereof, and of any damages to the leasehold interest thereunder caused by the widening of Dupont street under said Act of the Legislature, drew another warrant, number 114, payable out of said fund, for the same amount of \$10,932 for which said warrant No. 92 had been drawn, as aforesaid, and so awarded to said lot of land as hereinbefore stated, and deposited the same with defendant Reynolds, County Clerk, and on the fourteenth day of July, 1877, notified defendant Hubert, Treasurer, of the drawing and deposit thereof, and of the description of the lot covered by said warrant No. 114.

"That on the thirtieth day of August, 1877, said Tibbey presented said warrant No. 92 pursuant to his power and authority aforesaid, to said defendant Hubert, Treasurer, who paid the same to him on that day out of the money in the Dupont Street Fund to its full amount of \$10,932 gold coin, and marked the said warrant No. 92 'paid' and filed the same in his office.

"That at the time of such payment, defendant Hubert had no notice, nor had he ever received any notice that said warrant No. 92, was drawn for the value of the identical lot and damages for which warrant No. 114 was drawn.

"That said Hunter and said plaintiffs are the only persons who have ever claimed any part of said award of \$10,932, and said Hunter is the only person who has ever claimed the whole thereof."

If the finding, that warrant No. 92 was delivered to and left with one Henry S. Tibbey (Secretary of the Dupont Street Commissioners), by defendant Hunter, "with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer, as aforesaid, and collect and re-

ceive from him the amount expressed therein of \$10,932 gold coin," means that there was an actual agreement between Hunter and Tibbey to the effect that the latter should collect the warrant, either for himself or for Hunter, the evidence does not support the finding. The evidence clearly shows that the warrant was to be left with Tibbey "to be placed in the hands of the County Clerk" until such time as the dispute between defendant Hunter and the present plaintiff should be determined. As there was nothing on the face of No. 92 to indicate that it represented the award for the property in which the plaintiff claims an interest, it may be that Hunter, by endorsing it as he did, clothed Tibbey with its ostensible ownership, and that those ignorant of the real arrangement between the parties might assume Tibbey to be the owner. It may be that, by reason of such endorsement, the Treasurer would have been justified in paying the warrant to Tibbey—*had he been in a position to defend the payment of warrant No 92 to anybody.*

The moneys awarded for the lot of land described in the complaint, and improvements thereon, were not paid to Hunter or to any one authorized by Hunter to receive them. Hunter, personally, has never received them; and, if he is to be treated as having received them, it is because he is estopped by his endorsement of warrant No. 92 from denying that Tibbey was authorized to receive them for him. But such estoppel could only be asserted by the Treasurer in case he had paid to Tibbey the sum called for by the warrant, in ignorance of the *fact* that Tibbey was not authorized to receive the money. The evidence shows, beyond dispute, that the Treasurer paid to Tibbey the sum called for by No. 92 in violation of his official duty, and with full knowledge that 92 represented the amount of damages allowed for the property to which the present plaintiff asserted a claim, and that he paid 92 with the money which he himself had set aside for the payment of 114, then on deposit with the County Clerk to await the determination of this action. The payment to Tibbey of the money which should have been reserved for distribution in accordance with the decree herein, was, under the circumstances, no more a payment to Hunter than would have been a payment of the sum to a stranger, or an appropriation of it by the Treasurer himself. (To avoid any possible misapprehension it is proper here to say that the payment was made by a deputy of the Treasurer and not by that officer personally.) It is not necessary to decide whether the Treasurer would be authorized in this action to object to a decree that defendant Hunter had an

interest to the extent of a certain sum in warrant 114, and its proceeds, on the ground that he had already paid inadvertently to Hunter a like or greater sum. As the case is presented it appears the Treasurer has never paid to Hunter or to his order any portion of the amount awarded to the property in which plaintiff claims an interest as lessee.

Certainly the plaintiff here, who, beyond all question, is entitled to an interest in warrant 114, and in the proceeds thereof to the extent of \$1,650, could not be deprived of his claim against the treasury by the circumstance that the County Treasurer had paid a like sum to another person upon another warrant. Plaintiff had no connection with the receipt for or endorsement of warrant 92 by defendant Hunter, nor did the law make the latter the agent of plaintiff to receive any warrant awarded to property in which the plaintiff was interested. Plaintiff had no interest in 92 or in any other warrant than 114; the only warrant deposited with the County Clerk.

The decree of the Court below should have adjudicated the conflicting claims of plaintiff, as lessee, and defendant, as lessor, in warrant No. 114, and have provided "for its just and proper distribution. (Section 15.) At first view we were inclined to the opinion that the office of the Court would have been discharged by declaring the interest of each in warrant No. 114, leaving any defense which the Treasurer might have against the payment of warrant 114 to be asserted when its payment should be demanded. But Section 15 provides that a party in interest "may proceed against the Treasurer by bill in equity," and a fuller consideration of its terms satisfies us that the Legislature intended that the decree in an action like the present should be binding upon the Treasurer, and conclusively determine his duty to pay to each of the parties adjudged to have an interest in the warrant the sum decreed to be the value of such interest.

As there is but one warrant, the decree hereafter to be entered, should provide (the parties being properly indemnified) for the appointment of an officer of the Court to receive it, for the parties in interest, from the County Clerk, who, on the entry of final decree, must deliver the warrant to the party or parties entitled thereto, "according to the order of the Court" (Sec. 15) and for a distribution of the amount collected upon the warrant by such officer.

Judgment reversed and cause remanded with direction to the Court below to enter a decree in accordance with the views expressed in the foregoing opinion.

We concur: McKee, J., Morrison, C. J., Ross, J., Sharpstein, J., Myrick, J.

DEPARTMENT No. 2.

[Filed November 13, 1882.]

No. 8679.

RHODES, PETITIONER,

VS.

SPENCER, JUDGE, ETC., RESPONDENT.

MANDAMUS—NEW TRIAL—SPECIAL ISSUES—JURY—VERDICT. After certain special issues submitted to a jury had been passed upon by them, the Court set the verdict aside and granted a new trial as to such issues. Petitioner claims that all issues in the case should have been determined before a new trial could be ordered, and applies for a mandate to compel defendant to proceed and continue with the trial of the issues that were not submitted to the jury. *Held*, petitioner is not entitled to the writ.

Vincent Neale, for petitioner.

By the COURT:

We think the facts set forth in the petition do not entitle the plaintiff to the relief prayed for.

Writ denied.

DEPARTMENT No. 1.

[Filed November 6, 1882.]

No. 8668.

CONDEE ET AL., RESPONDENTS,

VS.

BARTON, APPELLANT.

BROKER—COMMISSION—MEMORANDUM—ESTOPPEL—OWNER. A real estate broker is not estopped from claiming commission because the "memorandum of agreement" describes defendant as owner of the property to be sold.

CONCLUSIONS OF LAW—FINDINGS—JUDGMENT—PRACTICE. The conclusions of law, based upon the finding of facts, may be changed at any time before judgment is entered.

D.—ID. A judgment is not final until recorded.

Appeal from Superior Court, San Bernardino County.

Satterwhite & Curtis, for appellant.

Willis and Rowell, for respondent.

By the COURT:

We know of no principle that would estop the plaintiffs from claiming their commission, because the "memorandum of agreement" describes the defendant as owner of the property to be sold.

We can see no objection to the practice of changing the conclusions of law, based upon the finding of facts, at any time before judgment is entered. The declaration of the general conclusion of law from the facts found, is the rendition of the judgment in so far as that, when entered, the judgment entered may relate to such rendition for certain purposes. But this does not make the conclusions of law first announced final and beyond the reach of the Court. There is no judgment which is final until a judgment is recorded.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed October 26, 1882.]

No. 7222.

TILDEN, RESPONDENT,

VS.

SAUCELITO LAND AND F. COMPANY, APPELLANT.

APPEAL—CONFLICTING TESTIMONY—VERDICT. The verdict will not be disturbed on appeal where there is a substantial conflict in the testimony.

Appeal from Superior Court, San Francisco.

McElrath & Eells, for appellant.

Estee & Boalt, for respondent.

By the COURT:

The sole point discussed on the argument in this case, relates to the sufficiency of the evidence to sustain the verdict.

It is contended that there is no evidence that the plaintiff was ever engaged by the defendant to do the work, to recover pay for which the action was brought.

In our judgment the case is one of substantial conflict of evidence on this point, and, according to the long settled rule, the verdict cannot be disturbed.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed October 27, 1882.]

No. 7252.

WESTERN DEVELOPMENT COMPANY, RESPONDENT,

vs.

EMERY, APPELLANT.

ACTION—CONTRACT—SUBSCRIPTION—PARTY IN INTEREST—PROMISE. Complaint on a subscription-contract. Defendant contended that the promise was to the "subscription committee," and that the paper was not assigned to plaintiff. *Held*, as the contract was made for the benefit of plaintiff, and it is the real party in interest, the action was properly brought in its name. (C. C. P. 367.)

Appeal from Superior Court, San Francisco.

A. C. Adams, for appellant.

McClure, Dwinnelle & Plaisance, for respondent.

By the COURT:

The contract sued on in this case, was made for the benefit of the plaintiff, and plaintiff is the real party in interest, as the money, when recovered, will belong to the company.

It follows that the action was properly brought in the name of the Western Development Company. (C. C. P. Sec. 367; *Summers vs. Farish*, 10 Cal. 347; *Wiggin vs. McDonald*, 18 Id. 126.)

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed October 30, 1882.]

No. 7327.

BATEMAN, RESPONDENT, vs. BLUMENTHAL, APPELLANT.

APPEAL—DAMAGES. Where the appeal is for delay and without merit, damages will be imposed.

Appeal from Superior Court, San Francisco.

Alfred Rising, for appellant.

Michael Mullaney, for respondent.

By the COURT:

It is evident from the record in this cause that the appeal is taken for delay, and that there is no merit in the appeal. Judgment affirmed with fifteen per cent. damages.

DEPARTMENT No. 2.

[Filed November 3, 1882.]

No. 8389.

NEWELL, RESPONDENT,

VS.

J. SEXTON, EXECUTOR, APPELLANT.

CONVERSION—ASSIGNMENT—PLEDGE—ACCOUNT. Action for an alleged conversion of three promissory notes by defendant's testator, R. K. Sexton. The three notes were pledged by one Hammell to testator to secure a \$7,000 note. Hammell subsequently transferred the legal title to his interest in the notes pledged to one Hayman, and the latter assigned to plaintiff. The sum claimed is the excess due on the three notes over the amount due testator by the pledgor Hammell. From the facts of the case it is held it was intended that the interest of Hammell in the notes pledged should pass to Hayman, the former relying upon the promise of the latter that he would properly account, a promise which can be enforced when plaintiff (assignee of Hayman) shall have recovered judgment in the present action.

Appeal from Superior Court, Santa Barbara County.

R. B. Canfield, for appellant.

Thomas and Scrutton, for respondent.

By the COURT:

The assignment from Hammell to Hayman transferred the legal title to the former's interest in the notes pledged to plaintiff's testator—being Hammell's property in the excess of the amount collected from the notes pledged beyond the indebtedness due from Hammell to the pledgee, with the right to sue for the whole of such excess. The assignment was made to secure Hayman against a contingent liability upon certain other notes which he had signed for the accommodation of Hammell, and contemplated advances, Hayman agreeing to pay Hammell "all the proceeds of said notes herein sold to him after deducting therefrom the amount of said Sexton's claim and the amount which said Hayman shall actually pay at any time upon said two notes upon which he is joint maker with said Hammell as aforesaid." It seems plain it was intended the interest of Hammell in the notes pledged should pass to Hayman, the former relying upon the promise of the latter that he would properly account; a promise which can be enforced when plaintiff shall have recovered his judgment in the present action.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 8585.

WOOD, APPELLANT, vs. FORBES ET AL., RESPONDENTS.

APPEAL — DISMISSAL — AFFIDAVITS — STIPULATION — TIME — TRANSCRIPT.

Motion to dismiss appeal for failure to file transcript within proper time granted.

Id.—Id. If it be admitted that affidavits can be considered which tend to show a verbal stipulation to extend the time to file the transcript, there are in this case affidavits more numerous and pointed to the effect that no such stipulation was made.

Appeal from Superior Court, Butte County.

Burt & Hamilton and *Lusk & Turner*, for appellant.

Gale & Jones, for respondents.

By the COURT:

The motion to dismiss the appeal must prevail. If it be admitted that affidavits can be considered which tend to show a verbal stipulation to extend the time to file the transcript, there are in this case affidavits more numerous and pointed to the effect that no such stipulation was made.

Appeal dismissed.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 8678.

TAYLOR, PETITIONER, vs. HUGHES, RESPONDENT.

WRIT OF REVIEW—FISH COMMISSIONERS—DAM. Application to review the proceedings of a Justice's Court resulting in the conviction and sentence of petitioner for failure to keep a dam in repair after request by the Fish Commissioners. *Held*, the petition does not present a case for the issuance of the writ.

Nygh & Fairweather, for petitioner.

By the COURT:

The petition does not present a case for the issuance of a writ of review.

Writ denied and proceedings dismissed.

In the Superior Court,

CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Department 4—WAYMIRE, J.

MARY FINNIGAN vs. DAN FINNIGAN.

- COMMUNITY PROPERTY—COLLUSIVE SUIT BY HUSBAND TO GET POSSESSION OF IT—IMPEACHMENT OF JUDGMENT COLLATERALLY, ON THE GROUND OF FRAUD.** In an action for divorce, the wife may introduce evidence collaterally attacking and impeaching a judgment obtained by a pretended creditor of her husband, who collusively attaches the community property for the benefit of the husband; and she may show that defendant, his attorneys, and the pretended creditor, conspired to deprive her of any part of the community property by a collusive suit.
- Id.** Evidence showing that one of the assignees of the pretended judgment fraudulently obtained possession of the community property, consisting of money in bank, by an execution issued in a collusive suit against the husband, is competent when it is shown that the assignee had knowledge of the fraud, and held the judgment or its fruits under execution in secret trust for the husband.

*Charles F. Hanlon and T. C. Van Ness, for plaintiff.**T. L. Skinner and A. A. Pardow, for defendant.*

STATEMENT OF THE CASE.

The action was divorce. The cause coming on for trial by the Court, the following facts were found: (1) That the defendant deserted and abandoned the plaintiff; (2) that the defendant failed, neglected, and refused to provide for the plaintiff the common necessities of life; (3) that the defendant has been guilty of extreme cruelty to the plaintiff; (4) that the custody of the child belongs to plaintiff; (5) that the community property of plaintiff and defendant consists of the sum of \$1,647.84 in United States gold coin.

Prior to the commencement of this action said community property was on deposit in the Hibernia Savings and Loan Society, a banking institution in the city and county of San Francisco, to the credit of the plaintiff, and plaintiff commenced an action, entitled Mary Finnigan against The Hibernia Savings and Loan Society, case No. 3203, in the Superior Court of the said city and county of San Francisco, Department No. 3 thereof, to have her claims to said property judicially determined. That it was decreed in said action No. 3203, that the sum of \$1,874.29 was the common property of the parties hereto. That the sum of \$1,647.84 of the said common property, together with other moneys, was, on the 28th day of January, 1881, paid in said action, No. 3203, into said Court, Department 3 thereof. That thereafter, to wit, on or about the first day of October, 1880, defendant, D. Finnigan, with the knowledge and consent of A. A. Pardow, conspired with one T. L. Skinner, an attorney-at-law, that said D. Finnigan should give his note for \$2,500

and interest to G. B. Mackrett, a collector, when in truth and in fact no money whatsoever was due to said Mackrett by said Finnigan, all of which said Pardow, Skinner and Finnigan well knew, and that said Mackrett should commence a suit thereon in the Superior Court of the said city and county of San Francisco against D. Finnigan, and attach said moneys standing to plaintiff's credit in said bank. That pursuant to said knowledge, consent and understanding, said note was executed and delivered to said Mackrett, and said A. A. Pardow, pursuant to said knowledge, consent and understanding, brought said suit, entitled *Mackrett vs. D. Finnigan*, and appeared therein as attorney for G. B. Mackrett against said D. Finnigan. That no *bona fide* defense was made by said Finnigan nor by said Skinner, who appeared for said D. Finnigan in this action, as well as said action No. 3203, but said Mackrett was allowed, through the collusion and connivance of said D. Finnigan, to take judgment against him for the full amount sued for by said Mackrett, namely, \$2,600 and costs. That a writ of attachment therein was sworn out by said Mackrett, and it, as well as an execution under said judgment, was duly levied upon the moneys standing to plaintiff's credit in the said bank. That said simulated note was executed and the said suit thereon commenced, and said judgment obtained and said attachment and execution levied on said moneys, through the fraud, collusion, and procurement of defendant, and for the sole purpose of depriving plaintiff of her rights therein. That said Mackrett, pursuant to the collusive understanding with defendant and his attorneys, afterwards assigned his judgment to said A. A. Pardow, without consideration. That said Pardow, in pursuance with said knowledge, consent and understanding, held the same in secret trust for the benefit of defendant. That said Pardow afterwards assigned said judgment to one Green, at the time engaged in the service of said T. L. Skinner, at the law office of said T. L. Skinner. That said Green also held said judgment in secret trust for said defendant. That afterwards the sum of \$1,147.84 of the said common property of the parties to this action, on deposit in said Court as aforesaid, was paid under an execution issued in said action of *Mackrett vs. Finnigan*, and paid over to said Green in secret trust for the said D. Finnigan. That no part of said common property has been paid to or received by plaintiff, and said Green has not yet paid over said money to D. Finnigan, but holds the same in secret trust for the use and benefit of said D. Finnigan, and subject to his order. That said suit of said Mackrett against said Finnigan, and all the proceedings had thereunder and in connection therewith, were collusive and fraudulent, and were brought and had and conducted by said D. Finnigan, Pardow, Skinner and Mackrett, for the purpose of fraudulently enabling said D. Finnigan indirectly to obtain the possession of the said common property of plaintiff and defend-

ant. That plaintiff is poor and without means, other than what she can earn by her daily labor or receive from the help and charity of her children for her support. That defendant is old and has no separate property. That plaintiff has no separate property whatever in her possession or under her control.

The foregoing finding of fraud and collusion was supported by the following testimony:

TESTIMONY OF DANIEL FINNIGAN.

Called for plaintiff; sworn:

Mr. Van Ness—Mr. Finnigan, you are the defendant in this case?

A.—Yes, sir.

Q.—You were the defendant in the action of George B. Mackrett against Daniel Finnigan on that promissory note for thirteen hundred odd dollars?

A.—Yes, sir.

Q.—How did you come to make that note?

A.—Well, I tell you. I was put out of my house and home without a five-cent piece in my pocket. I was put out by my wife, and I was starving, and I didn't know where to get a night's lodging or a place to sleep in. Before that I was working steady and gave my wages to my wife, and I asked her for two bits or something to get something to eat until I could get to work, and I had no other way, and I went in, and I went to find out how the money stood in the bank, and I could not find out. She had it in a friend's name; I knew it was not in hers or mine, and at last I found she had it made in her maiden name, and then I had no other way to get this, to save me, that she could get at me afterwards by any other thing or any other way only, the money that I earned.

Mr. Pardow—I don't see that this has got anything to do with the matter, and I object to this; I don't see the materiality of it.

Mr. Van Ness—I am trying to find out what became of the money.

Objection overruled. Exception.

Mr. Van Ness—Go on from where you left off—how you came to make that promissory note to Mackrett.

A.—Well, I employed Mr. Skinner as my lawyer, and he sent me up to Mr. Pardow's office. *He was a kind of a partner of his*, and he made arrangements with me, or I with him, that if we could make out the money they would recover it, by reason it was my property and their putting me out of my home; that I was entitled to something to live on if I could not get work. It was a panic for work and there was no work, and my neighbors and me could not get work.

Q.—Talk a little louder, for it is difficult for the reporter to keep up with you.

A.—Well, I don't see that I have anything else to tell you in

relation to it. I gave the note so that I could get the money into somebody's name instead of my own name.

Q.—That was the object of that suit—to enable you to get that money?

A.—Certainly, when I would get it; when the Court would give it to me that she could not get it back from me; that I would have something to live on, because she was trying all the time to cut me out of the money.

Q.—Was there any agreement made at the time that Skinner advised you to do this thing as to who should receive and hold this money pending the other suit, if you got hold of it?

A.—Yes, sir, there was an agreement.

Q.—What was that?

A.—That they should get so much of this money for their services.

Q.—What per cent. were you to pay them?

A.—Twenty per cent.

Q.—And they were to hold the balance subject to your order and to be paid to you?

A.—I had no money to pay them and I had an agreement with them.

Q.—They were to receive twenty per cent. of the amount recovered, and keep the balance for you?

A.—Yes, sir.

George B. Mackrett, called for the plaintiff, sworn.

Mr. Van Ness—Mr. Mackrett, do you know the defendant in this case, Daniel Finnigan?

A.—I do not.

Q.—You don't know him?

A.—No, sir.

Q.—In the month of July, 1880, you brought suit, did you not, against Daniel Finnigan for the recovery of certain moneys upon a promissory note made by Daniel Finnigan to you?

Mr. Pardow—I object to any testimony as to any suit brought against Daniel Finnigan.

Mr. Van Ness—I propose to prove by Mr. Mackrett that in the month of July, 1880, or thereabouts, A. A. Pardow, a practicing attorney in this city, went to Mr. Mackrett and told him that he wanted him to bring suit upon a promissory note that would be drawn in his favor and put in his hands for collection, to which Mr. Mackrett consented; that Mr. Mackrett was then taken by Mr. Pardow to his office, and there met Daniel Finnigan, the defendant in this case; that at that time, in the presence of Pardow and Mackrett, a promissory note was drawn by Daniel Finnigan, payable to George B. Mackrett, for the sum of \$2,615.25; that Mr. Mackrett had not previous to that time known or met Mr. Finnigan; that Mr. Finnigan did not owe Mr. Mackrett any money; that there was not any consideration whatever for that note, and that the note under those circum-

stances was handed either by Finnigan or Pardow, acting on his behalf, to Mackrett, and Mackrett brought suit in the Superior Court of the city and county of San Francisco upon that note; that a default was taken against Finnigan; that the judgment was assigned by Mackrett to A. A. Pardow either immediately previous to its rendition, or immediately subsequent thereto; that that judgment was subsequently assigned by Pardow to H. S. Green, a clerk in the office of one T. L. Skinner, an attorney at law in this city; that the consideration for the assignment to Skinner of the judgment was the assignment by Skinner of another judgment which was worthless against a party who had no property, and who was known to be insolvent, and was so made with the knowledge of all parties; that Mr. Pardow was cognizant of these facts; that Mr. T. L. Skinner and Mr. Pardow were the attorneys jointly representing Daniel Finnigan in the case; that the attorneys A. A. Pardow and T. L. Skinner appeared in the suit of Mary Finnigan, plaintiff, versus The Hibernia Savings and Loan Society and others, defendants, number 3203, Superior Court of San Francisco, pending in Department 3, Mr. Skinner appearing for Mr. Finnigan, Mr. Pardow appearing for Mr. Mackrett; that they jointly and in connection conducted the case in that suit against Mrs. Finnigan, and obtained that money from the Hibernia Bank as common property; that the money was received by Pardow and Skinner as attorneys in that action, and was received on the behalf of Daniel Finnigan, the defendant in this action; that is what we propose to prove.

Objection was argued by counsel. Plaintiff cited Section 336, Freeman on Judgments, viz:

"Whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing *even in a collateral proceeding* the fraud or collusion by which the judgment or decree was obtained."

Citing, among others, the case of *Hackett vs. Manlove*, where the Court, Baldwin, J., says:

"We do not understand this effort to prove that Rogers was a mere collusive creditor as collaterally impeaching a judgment within the meaning of the familiar rule on this subject. It is merely assailing the judgment or process which may always be done by one not a party to it in cases like this." In other words the plaintiff says: "I had possession of, and property in, certain goods; this gave me the right to them against all the world, except only a *bona fide* creditor or purchaser. You have seized them by process as a creditor. I propose to show that neither you nor the person whom you represent are such creditors; and therefore my title is perfect against you." (14 Cal. 90.)

Objection overruled. Exception.

Q.—Now, I ask you to go ahead and state the whole transaction in your own way and give us all the facts connected with it.

A.—About the time set forth I was in the collecting business, myself and Mr. Wedekind, and had our office on Montgomery street, corner of Commercial, and there was a note left on the usual slip of paper on the desk that there was some parties there that wanted to commence suit.

Q.—State by whom the note was signed?

A.—I think it was signed by Skinner. I am almost sure it was; and some parties told me that they were going up to Mr. Pardow's office. I went up there and I inquired for Skinner, and Mr. Skinner came out and said: Oh! Mack; I spoke to you some time ago and said that anything I could throw in your way I would do it; and I said yes; and he said, I have got a note that I want collected; and I said, well, if it is all straight I will take it. So we stepped in the office of Mr. Pardow, and there were some gentlemen, one in the back office, and Mr. Pardow were there I believe, and after some time Skinner brought me the note and handed it to me. * * * * *

The suit was commenced and there was no more trouble about it that I know of. * * * * * I went to work in the City Hall, and I was anxious to get this case out of my hands. I did not want any more trouble with it, knowing there was nothing in it for me but a commission. I had no claim on Finnigan but a collection, and I went to Mr. Pardow's office and consulted with him and said: "Mr. Pardow, I don't want to be annoyed with this case, and I would rather make an assignment of it, and such time as you get it to judgment, whatever services I have done, I know you will remunerate me.

Q.—He handed you an assignment?

A.—I signed an assignment. Now, there is my whole connection with the case from the start to the finishing. *Whether crooked or straight, you have it.*

TESTIMONY OF A. A. PARDOW.

Called for plaintiff; sworn:

Mr. Van Ness: Q.—Mr. Pardow, you have heard the testimony that has been given here. The judgment was assigned to you by Mr. Mackrett, was it not?

A.—It was.

Q.—What disposition did you make of that judgment?

A.—I assigned that judgment to Mr. Green.

Q.—Who was Mr. Green?

A.—A gentleman here in the city.

Q.—In what employment was he?

A.—He was connected with the mining business in some way.

Q.—Was he not in Mr. Skinner's office?

A.—No, not to my knowledge; *he might have been.*

Q.—Don't you know that he was in the habit of serving papers Mr. Skinner?

A.—Not that I know of.

Q.—Was he not in Mr. Skinner's office more or less every day?

A.—I don't know; I was not there every day myself, and I don't know.

Mr. Pardow—All this is taken subject to our exception.

Mr. Van Ness—What was the consideration for that assignment, Mr. Pardow, to Mr. Green?

A.—I received an assignment of a judgment.

Q.—Just a moment before you go ahead. Did you assign to Green before the levying of this execution on that money?

A.—If I assigned.

Q.—You did not yourself receive any money on the judgment?

A.—No, sir, I did not.

Q.—Now, what was the consideration of the assignment?

A.—Mr. Green had a judgment against a doctor in Los Angeles, and Mr. Skinner, if I remember rightly, had an assignment from Green of that. He either had forty per cent. or Green had forty per cent., I don't remember which it was, and I got an assignment from Mr. Skinner of that.

Q.—And in consideration of the assignment from Skinner to you, against the man in Los Angeles, you assigned to Green this judgment here?

A.—Yes, sir.

Q.—Who was the judgment debtor in Los Angeles?

A.—He was a Doctor Gilcich, I believe.

Q.—Had you ever heard of him before?

A.—Oh, yes, sir; frequently.

Q.—What were his circumstances?

A.—He had some property down there that his wife died and left him—some property there that was in probate.

Q.—From whom did you get the information as to the property down there?

A.—I got it from Mr. Skinner.

Q.—You had none other in regard to that?

A.—No, sir.

Q.—Didn't you know at the time that you made the assignment of this Mackrett judgment to Green that there was money, community property, belonging to the Finnigans, in the clerk's office in this Court, out of which you could realize your judgment?

A.—Yes, sir, I think I did; I don't know exactly how that stood now, but I always looked upon that—

Q.—That is all.

A.—Well, I wish to state that I always looked upon that money in the clerk's office as subject to the order of the Court, in the event of the determination of these different suits which were pending between the two Finnigans. That was my impression of it from the word "go."

Q.—*Didn't you know at the time that you accepted the assignment of that judgment that the suit had been brought upon a note, which was given without consideration, and for the purpose of enabling Daniel Finnigan to get this money?*

A.—Yes, sir; I knew all about it.

Q.—You knew that that was the object of the suit?

A.—I inferred as much that that was the object of the suit.

Q.—And you knew that Skinner was the attorney of Daniel Finnigan?

A.—Yes, sir.

Q.—Was there not an attachment gotten out in this suit when it was originally brought—that Mackrett suit?

A.—I don't remember; I wouldn't like to say.

Q.—Well, we will offer those papers in evidence, and can be shown to-morrow sometime.

Do you know anything about the levying of the execution on the money in the clerk's office, whereby \$1,100 was realized?

A.—All I remember about that was, the Deputy Sheriff came to me with the execution—no, it was after the execution was issued, and after I had been in the case for Mr. Mackrett and knew the position of affairs and how the matter stood and exactly what to do—to go to the clerk's office to get the money, and the Sheriff wanted me to go with him and I wouldn't do it, and afterwards, when he came to me and said that he had the order of the Judge, signed by the clerk, I said I would go with him.

Q.—What became of the money?

A.—The money was paid on the execution.

Q.—Were you present when the money was paid?

A.—The money was handed to the Deputy Sheriff in my presence.

Q.—Do you know what the Deputy Sheriff did with it?

A.—I do not, sir; he went back to his office and that is the last I saw of him.

Q.—Would you know whether Mr. Levy was the attorney for your assignee in that suit of Mr. Green?

A.—I think he was retained by Mr. Green.

Q.—Were you present at any time when Mr. Levy, the attorney for Mr. Green, your assignee, paid over that money; if so, when was it and to whom was it paid?

A.—I think it was; I do not remember exactly; I think the money was paid by the Sheriff to Mr. Levy, and by him I think it was turned over to Mr. Skinner or Mr. Green, I forget which.

Q.—Were you not present when it was paid over to Mr. Skinner?

A.—No, sir, I was not.

Q.—Are you positive about that?

A.—The money was paid by Mr. Levy to Mr. Green.

Q.—Were you present at that time?

A.—Well, not exactly; it was done in the District Attorney's office, in a suite of four rooms; I was not in the immediate room; I was in one of the rooms.

Q.—Was Mr. Skinner there at that time?

A.—He was there.

Q.—Do you remember of having testified in a proceeding in this Court that you were present at that time when the money was paid over to Skinner; do you recollect having so testified?

A.—I do not remember; I have got the testimony here; I do not remember; I have the testimony here taken before Judge Allen.

Q.—Well, will you just look at your testimony there and see what you testified to there?

A.—I considered that after I assigned that judgment to Mr. Green I had nothing more to do with it.

Q.—I understand that, but I want to get your connection?

A.—And I wouldn't be here to try this case if Mr. Skinner was in town, but as Mr. Finnigan had no means to obtain anybody else, under the circumstances of the case I took it; what I testified here is correct, of course, as it happened soon after the transaction, and it would be the truth.

Mr. Pardow—If your Honor please, in my last testimony I stated on information, and I did object to my own testimony on the ground that it is hearsay, immaterial and irrelevant.

Motion denied. Exception.

New Law Publications.

PROCEEDINGS IN REM, by Rufus Waples. Callaghan & Co., Chicago, publishers.

The rapid advance of railroads, and the indifference with which they take (directly and indirectly) the property of others, is one of the many causes calling for a thorough understanding of the laws embraced in a work with the above title. The introduction is written by Judge Cooley, and the stamp of his endorsement thereby attaches to this book. We will, at a future time, review it at length. At present we content ourselves with quoting the concluding paragraph of the book:

“There can be no royal road to the condemnation of a man's property irrespective of his interests and his right to be heard. The Constitution must not be violated by the taking of property without due process of law; a dumb, inanimate defendant must not be denied defense through its owner; doors of justice must not be barred to rightful litigants, nor opened to defaulted ones through misapprehension of the effect of notice; nor should the fiction of the primary responsibility of a thing ever be recognized without the simultaneous recognition of its underlying fact.”

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Supreme Court of California.

IN BANK.

[Filed November 10, 1882.]

No. 6774.

CAMP ET AL., RESPONDENTS, VS. GRIDER, APPELLANT.

MORTGAGE—ESTATE OF DECEASED PERSON—PRESENTATION OF CLAIM—HOMESTEAD—CODE OF PROCEDURE—ADMINISTRATION. A mortgage was executed in 1872, joined in by husband and wife. October 21, 1874, the husband filed a declaration of homestead on the mortgaged premises, and in 1878 died, leaving as his sole heir defendant, his widow. On June 1, 1878, letters of administration were granted to defendant, who qualified, etc. On the 21st of the same month, after due proceedings had, the premises were set off to defendant as a homestead. The action in hand was to foreclose the mortgage, commenced December 31st, 1878. The mortgage claim was not presented to the administratrix, but plaintiffs expressly waived any and all recourse against any other property of the estate, etc., and claimed that under Section 1500, C. C. P., as it was in 1876 and since, they were entitled to recover without presentation of the claim. Defendant relied upon Section 1475, C. C. P., as it was from March 24, 1874, to April 16, 1880. Both sections were in force at the death of the husband and at the time of the commencement of this action. *Held*, they should be so construed as to maintain both, if possible. This can be done by limiting the operation of Section 1500 to all mortgages and liens other than liens or incumbrances on the *homestead* specifically required to be presented by Section 1475.

Id.—*Id.* The purpose of the Legislature in providing, by Section 1475, that if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead, if possible. That purpose is as clearly shown as can be by the language employed in the section: "If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed;" and this is followed with the express declaration that "the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Id.—*AFTER ACQUIRED TITLE.* A subsequently acquired title from the Government of the United States inures to the benefit of a prior mortgagee.

Appeal from Eighth District Court, Del Norte County.

Cooper and Gibbons, for appellant.

J. E. Murphy, for respondents.

Ross, J., delivered the opinion of the Court:

L. B. Grider, on the 25th of June, 1872, executed to the plaintiffs his promissory note for the sum of twenty-three hundred and twenty dollars. To secure its payment he and his wife, Rebecca C. Grider, joined in the execution to the plaintiffs of a mortgage upon certain property, a part of which the husband was at the time cultivating, but the title to which was then in the Government of the United States. Grider afterwards, in the year 1873, obtained the title to the property, and the title thus acquired by him inured to the benefit of his mortgagees. (*Christy vs. Dana*, 42 Cal. 179; *Kerkaldie vs. Larrabee*, 31 Cal. 445; *Clark vs. Baker*, 14 Cal. 612.) Subsequently, to wit, on the 21st of October, 1874, Grider filed, pursuant to the statutes of the State, a declaration of homestead on the mortgaged premises, and on or about the 26th of February, 1878, died in the county of Del Norte, leaving as his sole heir his widow, the defendant Rebecca C. Grider. On the first of June thereafter letters of administration upon the estate of the deceased were duly granted by the Probate Court of said county to the said Rebecca, who duly qualified as administratrix and entered upon the discharge of the duties of her office. On the 21st of June, 1878, the Probate Court, after due proceedings had, set off the said premises to the said Rebecca as a homestead. The present action was instituted to foreclose the mortgage. The complaint does not aver, nor do the findings show, that the mortgage claim was ever presented to the administratrix for allowance, but the plaintiffs in their complaint allege that they "expressly waive any and all recourse against any other property of the estate of the said L. B. Grider, deceased, other than the premises described in said mortgage;" and they contend, that having thus waived all recourse against any other property of the estate, they are entitled to maintain this action without presentation of the mortgage claim, by virtue of Section 1500 of the Code of Civil Procedure, which is, and since March 15, 1876, has been, as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien

to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

The appellant, who was the defendant in the Court below, relies on Section 1475 of same Code, which, from March 24, 1874, to April 16, 1880, reads thus: "If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Probate Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Both of the sections quoted were in force at the time of Grider's death and at the time of the commencement of the present action. They should be so construed as to maintain both, if possible. This can be done by limiting the operation of Section 1500 to all mortgages and liens other than liens or incumbrances on the *homestead*, specifically required to be presented by Section 1475. (*Gonzales vs. Wasson*, 51 Cal. 297; *Langenour vs. French*, 34 Cal. 92.)

The purpose of the Legislature in providing, by Section 1475, that if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead if possible. That purpose is as clearly shown as can be by the language employed in the section: "If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed;" and this is followed with the express declaration that "the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Judgment reversed and cause remanded, with directions to the Court below to sustain the demurrer to the complaint.

We concur: Morrison, C. J., Thornton, J., Myrick, J., McKinstry, J.

I dissent: McKee, J.

IN BANK.

[Filed October 30, 1882.]

No. 10,762.

PEOPLE, RESPONDENT, vs. HELBING, APPELLANT.

BATTERY—ASSAULT WITH DEADLY WEAPON—VERDICT. The offense of battery is not included within nor is it an ingredient of the offense of assault with a deadly weapon, with a felonious intent.

ID.—JEOPARDY—INFORMATION. Under an information for assault with a deadly weapon with intent to commit bodily injury, defendant cannot legally be convicted of battery; such a conviction, especially when set aside on motion of defendant, constitutes no bar to a second trial upon the same information.

ID.—ID. To entitle a defendant to the plea of *autrefois* convict or acquit, it is necessary that the offense charged be the same in law and in fact.

Appeal from Superior Court, San Francisco.

R. P. Wright, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an appeal from a judgment of conviction, and an order denying a motion for a new trial, upon the second trial of an information for the offense of assault with a deadly weapon, with intent to commit bodily injury.

The defendant was convicted of battery on the first trial of the information; from that judgment he appealed to the Supreme Court, and, on the hearing of his appeal, the judgment was reversed and the cause remanded for a new trial. At the second trial the defendant pleaded, in addition to his plea of not guilty, the pleas of former acquittal of the offense charged, and twice in jeopardy for the same offense. These pleas were found against him by the jury, under the instructions of the Court. Upon the plea of not guilty he was found guilty as charged in the information, was so adjudged and sentenced, and from the last conviction the present appeal has been taken.

It is contended, on behalf of the appellant, that the conviction is erroneous, because by the former conviction of "battery" he was acquitted of the offense for which he now stands convicted. But the former conviction did not legally operate as an acquittal of the offense charged in the information, unless it was for an offense included within the offense charged; and that presents the question, whether the offense of "battery" is included within or is an ingredient of the offense of assault with a deadly weapon, with a felonious intent.

The essential elements of the last named offense are the assault, the weapon, and the intent. An assault is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another. (Sec. 240, Pen. C.) This offense is punishable by fine or by imprisonment in the county jail (Sec. 241, Id.), and is therefore a misdemeanor; but when made with a deadly weapon, with a felonious intent, it develops into a felony (Secs. 221, 245, Id.), which, in its elements and unity, includes the misdemeanor. (*People vs. Vanard*, 6 Cal. 562; *People vs. English*, 30 Id. 214; *Ex parte Ah Cha*, 40 Id. 426; *Ex parte Max*, 44 Id. 579.)

The offense of battery is the unlawful use of force or violence upon the person of another; it is also, like an assault, a misdemeanor, because it is punishable by fine or imprisonment in the county jail, or by both fine and imprisonment (Secs. 242, 243, Id.); it is therefore a greater offense than assault, and, being the greater, it includes the less. But the less does not include the greater. Battery, therefore, includes assault, but assault does not include battery; nor is the latter included within nor an ingredient of the offense of assault with a deadly weapon with a felonious intent. Upon trial for the latter offense a defendant could not equally be convicted of battery; and such a conviction, especially when set aside on motion of defendant himself, constitutes no bar to a second trial upon the same indictment or information. To entitle a defendant to the plea of *autrefois* convict or acquit, it is necessary that the offense charged be the same in law and in fact. (*Com. vs. Roby*, 12 Pick. 504; *Stute vs. Standifer*, 5 Port. 530; *Reg. Taylor*, 3 B. & C. 502.)

There is no error in the record prejudicial to the rights of the appellant.

Judgment and order affirmed.

We concur: Ross, J., McKinstry, J., Thornton, J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed October 30, 1882.]

No. 7235.

ONESTI, APPELLANT,

VS.

FREELON, JUDGE, ETC., RESPONDENT.

WRIT OF REVIEW—JUDGE—COURT—MUNICIPAL COURT OF APPEAL. The Superior Court dismissed a writ of review and affirmed the judgment of the late Municipal Court of Appeals of San Francisco. The writ was directed to Thomas W. Freelon, as Judge of such Court, and the return was made by him. *Held*, under 1070, C. C. P., the writ should have been directed to the Court, and the return made by the Clerk.

ID.—ID. The proceeding contemplated by the Code is a proceeding against the tribunal instead of the Judge.

ID.—ID.—MOTION—PRACTICE—PRESUMPTION. The motion to dismiss was made on the grounds that the writ was improperly issued and for want of prosecution. The order granting the motion did not state the grounds on which it was granted. *Held*, the presumption is that it was on both grounds stated in the motion.

ID.—ID. Where a motion is granted dismissing a proceeding of this kind on the grounds that the writ was improperly issued and for want of prosecution, the merits of the case (further than may necessarily result from granting the motion) are not for adjudication. Accordingly, so much of the order as affirmed the judgment of the Municipal Court of Appeals was made without authority of law, and was error.

Appeal from Superior Court, San Francisco.

A. D. Splivalo, for appellant.

J. G. Severance, for respondent.

By the COURT:

The Court below made an order granting a motion to dismiss the writ of review and affirming a judgment of the Municipal Court of Appeals. The allegations in the petition and the relief demanded are pointed to said Thomas W. Freelon, Judge of the Municipal Court of Appeals of the city and county of San Francisco; the writ of review was directed to said Thomas W. Freelon, as such Judge, and the return was made by him.

According to Section 1070, Code of Civil Procedure, the writ should have been directed to the Court instead of the Judge, and the return should have been made by the Clerk. The proceeding contemplated by the Code is a proceeding against the tribunal instead of the Judge.

The motion to dismiss was made on the grounds that the writ was improperly issued and for want of prosecution.

The order granting the motion does not state the grounds on which it was granted; therefore we presume it was on both grounds stated in the motion.

Where a motion is granted dismissing a proceeding of this kind, on the grounds that the writ was improperly issued and for want of prosecution, the merits of the case (further than may necessarily result from granting the motion) are not for adjudication. Therefore, so much of the order as affirmed the judgment of the Municipal Court of Appeals was made without authority of law, and was error. The cause is remanded with instructions to strike out of the order the objectionable clause, and in all other respects the order is affirmed.

DEPARTMENT No. 1.

[Filed November 8, 1882.]

No. 7518.

STEELE, RESPONDENT,

vs.

SUPERVISORS OF MERCED COUNTY, APPELLANT.

APPEAL—NOTICE—AFFIDAVIT.

Appeal from Superior Court, Merced County.

Farrar, Wigginton, and Ward, for appellant.

Laura De Force Gordon, for respondent.

Appeal dismissed upon authority of *Reed vs. Allison*, 10 Pac. C. L. J. 239.

DEPARTMENT No. 2.

[Filed November 2, 1882.]

No. 8531.

BARROILHET, RESPONDENT,

vs.

FISCH ET AL., APPELLANTS.

ASSIGNMENT—INSOLVENCY. Assignment by insolvent for the benefit of creditors held valid.

Appeal from Superior Court, San Francisco.

Nye, York & Whitworth, for appellants.

Edward J Pringle, for respondent.

By the COURT:

The assignment from A. Vorbe to the plaintiff was a valid assignment, none of the objections thereto being well taken.

It is unnecessary for us to pass upon the question of the remedy, as no point is made upon it.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed November 1, 1882.]

No. 7425.

CLARK, APPELLANT, VS. CLAYTON ET AL., RESPONDENTS.

INJUNCTION—ACTION—UNDERTAKING—NONSUIT. Suit upon an undertaking given on the issuance of an injunction in the action. (*Nichol vs. Littlefield.*) The undertaking contained the condition that Nichol would pay, etc., if the Court *finally* decided that plaintiff was not entitled to the injunction. An order was made dissolving the injunction and continuing the cause for the term. After the injunction was dissolved, and while the cause was so continued, suit in hand was brought. *Held*, it was prematurely brought.

Appeal from Superior Court, San Francisco.

B. S. Brooks, for appellant.

Flournoy, Mhoon & Flournoy, for respondents.

By the COURT:

In this case, we are of opinion that the action was prematurely brought and the nonsuit was properly granted.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed November 2, 1882.]

No. 7452.

BLOCKMAN ET AL., APPELLANT,

VS.

MARSICANO ET AL., RESPONDENTS.

MECHANIC'S LIEN—CLAIM—CASH. Complaint for a mechanic's lien. The claim of lien in stating the terms, time given, and conditions of the contract, used the words, "Cash upon demand, in gold coin of the United States." *Held*, a substantial compliance with the statute.

Id.—Id. *Hooper vs. Flood*, 54 Cal. 221, presented a statement quite different in effect from that here presented.

Appeal from Superior Court, San Francisco.

George D. Shadburne, for appellants.

Roche & Desbeck, for respondents.

By the COURT:

The claim of lien in this case, in stating the terms, time given and conditions of the contract, used the words "cash upon demand, in gold coin of the United States." This was a substantial compliance with the requirement of the statute. The case of *Hooper vs. Flood*, 54 Cal. 221, presented a statement quite different in effect from that here presented.

Judgment and order reversed and cause remanded for a new trial.

THE RAILROAD TAX CASE.

In the Circuit Court of the United States.

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

COUNTY OF SAN MATEO

VS.

SOUTHERN PACIFIC RAILROAD COMPANY.

1. The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation.
 2. The "equal protection of the laws" to any one implies not only that he has a right to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.
 3. Uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of percentage charged.
 4. By the thirteenth article of the Constitution of California, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby," and, "except as to railroad and other quasi public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property: **HOLD**, That in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity.
- Private corporations are persons, within the meaning of the first section of the Fourteenth Amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws.

6. Neither the Constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law.
7. Whatever the character of the proceeding, by which one is deprived of his property, whether judicial or administrative; and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law.
8. The provisions of Article XIII of the Constitution of California, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations.
9. The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation.
10. Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.
11. The Constitution of California (Sec. 15, Art. IV) provides that "on the final passage of all bills they shall be read at length and the votes shall be by yeas and nays upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the Court, to inform itself, will look to the journals of the Legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law.
12. The journals of the Legislature show that the Act of March 14th, 1881, mentioned in the opinion, never became a law.

STATEMENT OF THE CASE.

This was an action commenced by the county of San Mateo, of California, under the provisions of an Act of the State, of 1880, (Statutes of 1880, page 136), for the recovery of State and county taxes, claimed to be due from the defendant to the plaintiff for the fiscal year 1881-'82. The complaint is in the form prescribed by the statute. The amended answer contains a general denial of every allegation of the complaint, and sets up special matters as a defense. With this general denial the Court does not deal; it deals only with the special matters pleaded, it having been agreed by counsel that if they constitute a defense to the action judgment final shall be entered for the defendant, otherwise for the plaintiff.

The material averments of the answer in this respect are, that the defendant is a corporation existing under the laws of the United States and of the State of California, having its principal place of business in the city and county of San Francisco; that it was organized in the year 1878 under an Act of the Legislature of the State, entitled "An Act to provide for the incorporation of railroad companies, the management of the affairs thereof and other matters relating thereto," approved May 30th, 1861 that the term of its existence was to be fifty years from the date

of its organization ; that it is still in existence under said laws, except in so far as its existence and character are affected by the federal enactments referred to and made part of the answer; that many of its stockholders and members now are and ever have been citizens of the United States, residents of the State of California, while many other stockholders and members are citizens of the United States and residents of States other than the State of California; that it constructed a line of railroad known as the Southern Pacific Railroad, which commences at the city of San Francisco, and extends in a southerly direction to connect with the Texas and Pacific Railroad and the Atlantic and Pacific Railroad, both of which are chartered by Act of Congress; that prior to the first day of January, 1881, it was indebted to divers persons, citizens of the United States, many of them citizens and residents of the State of California, in large sums of money, which were advanced for and used in the construction and equipment of the defendant's railroad; that to secure the payment of such indebtedness, the company, prior to the 1st day of January, 1881, executed and delivered a mortgage upon its railroad, rolling-stock, appurtenances, and franchise, and upon divers tracts of land belonging to it and situated in different parts of the State; that the indebtedness so secured exceeds three thousand dollars per mile, and is still subsisting, secured as aforesaid, no part thereof having been paid except its accruing interest.

It is further averred that the assessment, according to which the taxes claimed were levied, was made on the 2d day of May, 1881, by the Board of Equalization of the State of California; that the Board assessed against the defendant the whole of its railroad property, and failed to deduct from its value the mortgage given thereupon to secure said indebtedness; that the assessment was made without notice to the defendant, and that neither the Constitution nor the laws of the State of California provided in respect to such assessment an opportunity of time, place, or tribunal for the defendant to be heard, or for any notice to the defendant before its liability was fixed; that all owners of railroad property situated in said State, and operated in more than one county, as is the property of the defendant, are denied any protection from the laws of California, which require with respect to other property that notice of its assessment shall be given to the owners; which require that before its liability shall be fixed an opportunity to be heard shall be afforded to them; which give to them an appeal from the assessor to a Board of Equalization; which require the assessment to be made in the counties in which the property is situated, and prevent its being made in localities distant from the situs of the property; and which allow deductions from its valuation for indebtedness secured by mortgage.

It is further averred that at and before, and ever since, the adoption of the Constitution of California now in force, there

were and have been existing under the laws of said State corporations of various kinds, formed for the purpose of, and actually operating and doing business and holding and using property in more than one county in the State; that at all said times there were, and there are now, divers natural persons, residents of said State, operating property in more than one county; that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, which are operated only in one county; that by the provisions of Section 10, Article XIII, of the State Constitution, persons operating railroads in more than one county in the State have been singled out from other persons operating property in more than one county in the State, and denied the right common to all other persons to apply for relief from over-valuation of their property by the assessor to local Boards of Equalization, and denied the rights and privileges accorded by law to all other persons in that respect.

It is further averred that the franchise of the defendant is held and its corporate powers exercised under authority of the Government of the United States; that by the several Acts of Congress set out in the answer the defendant was selected by the Government of the United States as a means and instrument of that government to construct the railroad in question, and to keep and maintain the same in repair, to the end that the Government of the United States might, when occasion required, use the same for the transportation of its armies, military stores, and mails, and for such other purposes as said government in the exercise of its powers might desire to use the same; that the Government of the United States has never given to the State of California the right to lay any tax on the franchise, existence, or operation of defendant; that such a tax would hinder and impede the lawful operations of the Government of the United States, and would hinder, delay and prevent the defendant from performing the obligation imposed upon it by said Acts of Congress, and would wholly nullify and prevent the enforcement of the same; and that in the assessment which constitutes the basis of plaintiff's action, the valuation of the franchise of the defendant—its right to exist—is so blended with the valuations affixed to the roadway, roadbed, rails and rolling stock, that it can neither be distinguished nor separated from them.

Upon the matters thus averred, it was alleged and claimed by the defendant that in the assessment of its property, according to which the taxes in suit were levied, an unlawful and unjust discrimination was made between its property and the property of individuals to its disadvantage, in that it was not allowed any deduction from the valuation of its property for the mortgage thereon, which is allowed for mortgages in the assessment of property of individuals; and that the company was thus subjected to an unequal share of the public burdens; and that, as this dis-

crimination was made in pursuance of provisions of the Constitution of the State, the company was denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution.

It was further alleged and claimed by the defendant that the assessment of its property was illegal and void, because made in pursuance of the provisions of the State Constitution, which gave no notice to the defendant, and afforded it no opportunity to be heard respecting the value of its property, or for the correction of any errors of the State Board, thus depriving it of its property without due process of law guaranteed by that amendment.

It was also averred and claimed that the franchise of the defendant was exempt from State taxation, the defendant having been selected by the Government of the United States as a means and instrument to construct the road, and to keep the same in repair, for the transportation of the troops, military stores, and mails of the United States; and for such other purposes as the Government, in the exercise of its powers, might desire.

The case was argued before Mr. Justice Field and Judge Sawyer, the argument commencing on the 21st day of August, 1882, and closing on the 29th. The opinions were read in the Circuit Court on September 25, 1882.

A. L. Rhodes, Attorney-General Hart, District-Attorney Towle, of Marin County, and District-Attorney Ware, of Sonoma County, for plaintiff.

Creed Haymond, J. Norton Pomeroy, T. I. Bergin, and T. B. Bishop, for defendant.

OPINION OF THE COURT.

By the Court, Field, Circuit Justice: This action is brought to recover from the Southern Pacific Railroad Company, a corporation formed under the laws of California, certain State and county taxes levied upon its property for the fiscal year of 1881 and 1882, alleged to be due to the plaintiff, with five per cent. added for their non-payment and interest. It was commenced in one of the Superior Courts of the State, and, on application of the defendant, was removed to this Court.

The railroad company, besides a general denial of the allegations of the complaint, sets up as a special answer to the action, that in the assessment of its property, according to which the taxes claimed were levied, an unlawful and unjust discrimination was made between its property and the property of individuals to its disadvantage, subjecting it to an unequal share of the public burdens; and that it was not afforded an opportunity of being heard respecting the assessment, and that such discrimination was made and proceeding had under the provisions of the Constitution of California, adopted in 1879, which in that respect are in conflict with the Fourteenth Amendment of the Constitution of the United States.

By the Constitution of California all property in the State, not exempt under the laws of the United States, is, with certain exceptions, to be taxed in proportion to its value, to be ascertained as prescribed by law; but in the ascertainment of its value as a basis for taxation, a distinction is made between the property owned by individuals and that owned by railroad corporations. By the thirteenth article, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured," is treated for the purposes of assessment and taxation, "as an interest in the property affected thereby," and, "except as to railroad and other quasi public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located in proportion to the number of miles of railway laid therein. No deduction from this value is allowed for any mortgages on the property.

By the Constitution there is also a different system of assessment provided for "the franchise, roadway, roadbed, rails, and rolling stock" of railroads operated in more than one county from that provided for other property. The assessment of other property is to be made in the county, city, or district in which it is situated, in the manner prescribed by law; and the Supervisors of each county constitute a Board of Equalization of the taxable property of the county, and must act upon prescribed rules of notice to its owners. A State Board of Equalization is also created to equalize the valuation of the taxable property of the several counties, so that equality may be preserved between the taxpayers of the different localities, and its action in this respect must likewise be upon prescribed rules of notice.

The assessment of the franchise, roadway, roadbed, rails and rolling stock of railroads operated in more than one county in the State is to be made by this State Board. And in making it, the Board is not required to give any notice to the owners, nor is any provision made for affording them an opportunity to be heard respecting the valuation of their property. The tenth section of the article which confers this power of assessment has been held by the Supreme Court of the State to be self-executing, requiring no legislation for its enforcement.

The defendant, as already stated, is a corporation formed under the laws of the State, and operates a railroad through several counties. The entire length of its road in the State is a little over seven hundred and eleven miles, of which twenty-five miles and one-tenth of a mile pass through the county of San Mateo. Its principal place of business is at San Francisco. Its stockholders are, and always have been, citizens of the United

States, some of whom are residents of this State, and some of other States. Previously to January 1st, 1881, it was indebted to different citizens of the United States, many of them residents of this State, in large sums, advanced to construct and equip the road; and to secure this indebtedness it executed, prior to that date, a mortgage upon its road, its franchise, and its rolling-stock and appurtenances, and also upon a large number of tracts of land situated in different counties. The indebtedness secured exceeds \$3,000 a mile of the road, no part of which, except the accruing interest, has been paid; the whole remains a valid and subsisting obligation of the company.

In the fiscal year of 1881 and 1882 the State Board of Equalization assessed the franchise, roadway, roadbed, rails and rolling-stock of the defendant at \$11,739,915, that is, at the rate of \$16,500 per mile, and apportioned to the county of San Mateo \$414,150. Upon the amount thus apportioned the taxes were levied, for which the present action is brought. In the assessment no deduction was allowed for the mortgage, but the property was assessed at its entire value independently of the mortgage. Nor was any notice given to the company by the Board of its action, nor was any opportunity allowed the company to be heard respecting the assessment. These facts are admitted by the demurrer, and the validity of the defense rests upon the application of the law to them.

The railroad company contends that the taxes are invalid and void on two grounds: 1st, because the assessment, according to which they were levied, was made in pursuance of the discriminating provisions of the State Constitution, in the enforcement of which the company was not allowed any deduction from the valuation of its property for the mortgage thereon, and was thus subjected to an unjust proportion of the public burdens, and denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution; and, 2d, because the assessment was made in pursuance of provisions of the State Constitution, which gave no notice to the company, and afforded it no opportunity to be heard respecting the value of the property, or for the correction of any errors of the Board, thus depriving it of its property without due process of law guaranteed by that amendment.

The plaintiff, on the other hand, contends:

1st. That the power of taxation possessed by the State is unlimited, except by the Constitution of the United States, and that its exercise cannot be assailed in a Federal Court, either for the hardship or injustice of the tax levied;

2d. That the classification of property for taxation, and the apportionment of taxes according to such classification, are not forbidden by the Constitution of the United States; and that within this principle the taxes on the property of the railroad company were lawfully imposed;

3d. That the Fourteenth Amendment of the Constitution of the United States was adopted to protect the newly-made citizens of the African race in their freedom, and should not be extended beyond that purpose;

4th. That corporations are not persons within the meaning of that amendment;

5th. That the statute fixing the sessions of the State Board of Equalization, and requiring a statement in writing from the defendant of the amount and value of its property, afforded all the notice and hearing essential to the validity of the assessment made; and,

6th. That the provisions of Article XIII of the Constitution, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations.

We do not state the positions of the several counsel, who argued the case, in their precise language, for they were presented in various forms, but we give their substance and purport.

The questions thus presented for our determination are of the greatest magnitude and importance. The answer to them concerns not merely the railroad corporations of this State, but all corporations, other than municipal, within the United States. It is of the highest interest to them all to know whether their property is subject to the same rules of assessment and taxation to which the property of individuals is subject, or whether it can be separated and distinguished from that of individuals and made liable to such different burdens in the way of taxation as the State may choose to impose. The questions have been argued with great ability and learning by distinguished counsel on both sides, and they have received from the Court the most patient and thoughtful examination. Indeed, their examination has been accompanied with a painful anxiety to reach a right conclusion, aware, as the Court is, of the opinion prevailing throughout the community—that the railroad corporations of the State, by means of their great wealth and the numbers in their employ, have become so powerful as to be disturbing influences in the administration of the laws; an opinion which will be materially strengthened by a decision temporarily relieving any one of them from its just proportion of the public burdens. That consideration, however, cannot be allowed to affect the judgment of the Court. Whatever acts may be imputed, justly or unjustly, to the corporations, they are entitled, when they enter the tribunals of the Nation, to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.

It is undoubtedly true that the power of taxation possessed by the State may be exercised upon any subject within her jurisdiction, and to any extent, not prohibited by the Constitution of the United States. As stated by the Supreme Court, "it may

touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." (*State tax on Foreign-held Bonds*, 15 Wall. 319.)

It is also undoubtedly true that the hardship and injustice of a tax levied by the State, considered with reference to its amount, are not subjects of Federal cognizance. Whether a tax upon property, subject to taxation, be one per cent. of its value, or ten per cent., or twenty or more, is a mere matter of State discretion; a question of policy and not of power. So we often find in the reports language to the effect that the State's power of taxation is without limitation; language which may be correct when applied to the special facts of the cases in which it is used, but which should always be read with a reservation that the exercise of the power does not conflict with any of the inhibitions of the Federal Constitution.

There are in the very nature of the Federal Government, and the powers with which it is clothed, many prohibitions upon the taxing power of the States. Within the sphere of its action that Government is supreme, and no impediment to the free and full exercise of its powers is permissible. The State cannot, therefore, place any restrictions upon the agencies of the Federal Government; otherwise it might embarrass and even defeat the operations of that Government. It was long ago said by Chief Justice Marshall, that the power to tax involves the power to destroy; and that there would be a manifest repugnance in allowing one Government to control the constitutional measures of another Government in respect to which the latter is declared to be supreme. When, therefore, Congress had created a bank of the United States as an agency in the management of the finances of the Government, it was held that the States were inhibited from taxing the institution. "If the States," said that great Judge, "may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States." (*McCullough vs. Maryland*, 4 Wheat. 432.)

For like reasons the public securities of the United States are exempt from taxation by the States, except so far as such taxation is permitted by Congress. A tax imposed by the city of Charleston upon all personal estate in its limits, including among other things stock of the United States, was, therefore, adjudged to be invalid. The Court said that the tax was upon a contract between the Government and individuals, and therefore operated directly upon the power to borrow money on the credit of the United States, that if the right to impose it existed with the States, it was a right which in its nature acknowledged no limits and might be exercised to an extent which would seriously embarrass the Government. Its existence was, therefore, held inconsistent with the supremacy of the Government in the exercise of its granted powers. (*Weston vs. Charleston*, 2 Peters, 449.)

Other illustrations might be given of implied inhibitions of the Federal Constitution to taxation by the States. The powers of the general Government cannot be interfered with, nor their exercise embarrassed in any respect by such taxation; as has often been held with reference to attempted taxation on goods imported, whilst retaining the character of imports in unbroken packages, and on goods in transit from one State to another. The power to regulate commerce, foreign and inter-state, cannot be thus trammelled by State action. (*Brown vs. Maryland*, 12 Wheat. 434; *Welton vs. State of Missouri*, 100 U. S. 275; *Webber vs. Virginia*, 103 U. S. 344.)

So in regard to the express prohibitions upon the States contained in the Federal Constitution; they apply equally to taxation and to any other action of the State. They cannot be evaded under the plea that the State possesses the unrestricted power to tax. Where, for example, a State has stipulated for a valid consideration to exempt certain property from taxation, as it has been repeatedly held that it may do, the stipulation cannot subsequently be withdrawn, and the property subjected to taxation. The provision which secures the inviolability of contracts against State legislation stands as a perpetual interdict against the imposition of the charge. It is to no purpose in such case to speak of the power of taxation as an attribute of State sovereignty, which cannot be surrendered; that sovereignty, whatever its extent, must be exerted in subordination to the prohibition of the Constitution, which is the supreme law of the land. Many of the attributes of sovereignty, which the States would possess if independent political communities, have been in like manner surrendered to the Federal Government, such as the power to declare war, to make peace, to enter into treaties of alliance, and to regulate commerce with foreign nations. The question in all cases presented to a Federal Court, where complaint is made of a tax levied by the States, is whether there is any inhibition, express or implied, in the Constitution of the United States upon the imposition of the tax. If there be, it is the duty of the

Court to enforce the inhibition, it matters not whom its decision may affect, nor how great and irresponsible the power of the State may be independently of such prohibition.

The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

Unequal exactions in every form, or under any pretense, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at one per cent. on the value of his property, another at two or five per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property.

In the Constitution of several States a provision is found requiring "equality and uniformity" in the taxation of property, and this is held to mean that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay the like amount upon similar kinds of property of the same value. As it seemed to one of the judges of the Supreme Court of Michigan: "To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to levy a forced contribution, not a tax, duty, or impost, within the sense of these terms as applied to the exercise of powers, by any enlightened or responsible government." (*Woodbridge vs. The City of Detroit*, 8 Mich. 301; *Burroughs on Taxation*, chap. v.) Absolute equality and uniformity may not be attainable in practice, but an approximation to them is possible, and any plain departure from the rule will defeat the tax.

What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the Fourteenth Amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio would be inconsistent with that equal protection which the amendment requires the State to extend to every person within its jurisdiction.

The application of the amendment to taxation has been recognized by the legislation of Congress. Soon after the adoption of the constitutional amendment abolishing slavery and involuntary servitude, measures were proposed to give practical freedom to the emancipated race, which resulted in the passage of the Civil Rights Act. This Act gave citizenship to persons of that race, and then declared that citizens of the United States, of every race and color, without regard to any previous condition of slavery or involuntary servitude, should have the same right in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and should be subject to like punishments, pains and penalties, and to none other. After the adoption of the Fourteenth Amendment Congress re-enacted this Act, and to the clause, that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishments, pains and penalties, it added, and subject only to like "taxes, licenses and exactions of every kind, and to no other." (R. S., Sec. 1977.)

The adjudications as to the meaning of the rule of equality and uniformity to be observed in taxation may, therefore, be properly referred to in construing the requirement of the Fourteenth Amendment when it is invoked with respect to burdens imposed by taxation. In *Lexington vs. McQuillan's Heirs* the Supreme Court of Kentucky said that the Legislature of the State had no constitutional authority to exact from one citizen the entire revenue of the commonwealth; and though the distinction between constitutional taxation and the taking of private property for public use by legislation might not be definable with perfect precision, the Court was clearly of the opinion that whenever the property of a citizen was taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction could not be considered a tax unless similar contributions were made by the public itself, or rather exacted by the same public will from such constituent members of the same community as own the same kind of property; and that, though there may be a discrimination in the subjects of taxation, still persons of the same class, and property of the same kind, must generally be subjected alike to the same common burden. (9 Dana, Ky., 513.)

In *State vs. Township of Readington* the Supreme Court of New Jersey said: "Taxation operates upon a community, or a class in a community, according to some rule of apportionment. When the amount levied upon individuals is determined without regard to the amount or value exacted from any other individual, or classes of individuals, the power exercised is not that of taxation, but of eminent domain. A tax upon the persons or property of A, B and C individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons, or property of the class of persons, or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation, and not of taxation." (36 N. J. L. 70.)

As the foundation of all just and equal taxation is the assessment of the property taxed, that is, the ascertainment of its value, in order that the tax may be levied according to some ratio to the value, uniformity of taxation necessarily requires uniformity in the mode of assessment, as well as in the rate of taxation, or, to quote the language of the Supreme Court of Ohio, expressing the same thought: "Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation." (*Exchange Bank of Columbus vs. Hines*, 3 Ohio St. Rep. 1.)

If we now look at the scheme of taxation prescribed by the Constitution of California for the property of railroad companies we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government. Whenever an individual holds property encumbered with a mortgage he is assessed at its value, after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage; that is, as though the property were unencumbered. The inequality and discriminating character of the procedure will be apparent by an illustration given by counsel: Suppose a private person owns a farm which is valued at \$100,000, and is encumbered with a mortgage amounting to \$80,000; he is, in that case, assessed at \$20,000; if the rate of taxation be two per cent. he would pay \$400 taxes. If the railroad corporation owns an adjoining tract worth \$100,000, which is also encumbered by a mortgage for \$80,000, it would be assessed for \$100,000, and be required to pay \$2,000 taxes, or five times as much as the private person.

There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property. Nothing can be clearer than that the rule of equality and uniformity is thus entirely disregarded.

The case of *People vs. Weaver* (100 U. S. 539), decided by the Supreme Court, respecting the taxation of shares of the National Banks, may be cited in this connection. Without the permission of Congress, the shares of these banks could not be taxed by the States. Congress gave the permission on condition that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State should be taxed at the place where the bank is located. (R. S., Sec. 5219.) In the case cited, the Court held, with regard to such taxation, 1st, that the prohibition imposed by Congress against discrimination had reference to the entire process of assessment, and included the valuation of the shares as well as the rate of percentage charged; 2d, that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the prohibition, although the same percentage on such valuation was levied; and 3d, that a statute which permitted a party to deduct his debts from the valuation of his personal property, except so much as consisted of those shares, taxed the shares at a greater rate than other moneyed capital. The assessment thus held to be a discrimination against the shares of National Banks in the taxation system of New York is similar to what we hold to be a discrimination against the property of railroad corporations in the taxation system of California.

In the case of the *Evansville Bank vs. Britton*, decided at the last term of the Supreme Court, the doctrine of the *Weaver* case was affirmed, and it was held that the taxation of shares in the National Banks, under the revenue laws of Indiana, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, which was allowed in the case of other investments of moneyed capital, was a discrimination against the Act of Congress, and illegal. (105 U. S. 322).

It is no answer to this discrimination to say that property in the State may be divided into classes, and different rates prescribed for them. Undoubtedly property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation, personal property to another rate. Property in particular districts may be taxed for local purposes, whilst property elsewhere may be exempt. Taxation on business, in the form of licenses, may also vary according to the calling or occupation licensed and the extent of business transacted, but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with the taxation of property that we are concerned in this case; and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the State for

the property of railroad corporations and the rate prescribed for the property of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation—not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value—as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly encumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage, and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value, without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner.

Is the defendant, being a corporation, a person within the meaning of the Fourteenth Amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? The learned counsel of the plaintiff, and the Attorney-General of the State, take the negative of this question, and assert with much earnestness that the amendment applies, and was intended to apply, only to the newly-made citizens of the African race, and should be limited to their protection.

It is undoubtedly true that the amendment had its origin in a purpose to secure to these newly-made citizens the full enjoyment of their freedom. When the amendment abolishing slavery and involuntary servitude was adopted, there were men in Congress who believed that it was intended to make every one born within the United States a freeman, and as such to give to each the right to pursue his happiness in the ordinary vocations of life, subject to no restraint except such as affects others, and to enjoy equally with them the fruits of his labor. They, therefore, proposed the Civil Rights bill, and secured its passage, the substantial provisions of which we have stated. Notwithstanding this expression of the National Legislature as to the purpose of the amendment, the newly-made citizens were subjected in several of the States to various disabilities and burdens,

and curtailed of their rights to such an extent that their freedom became of little value. To quote from the opinion of Mr. Justice Miller, speaking for the Court, in the Slaughter-house cases: "They were in some States forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain and hire, and were not permitted to give testimony in the Courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were inefficient or were not enforced." (16 Wall. 70.) There was probably much exaggeration in what was reported of their treatment, but the statements made produced a profound impression upon Congress. The validity of the Civil Rights Act was also called in question, and in some instances was adjudged by State Courts to be invalid. Reports also prevailed that loyal men of the South were treated with exceptional harshness, and that men from the North seeking residence there were met with marked hostility and aversion. It is not surprising that such was the fact, for notwithstanding the fiery courage and martial spirit of her people, their battalions had gone down before the forces of the Union. With the sound of the tread of the victorious army still ringing in their ears; with the desolations of war all around them, and the sudden rupture of their social relations by the emancipation of their former slaves, it would have been a miracle if bitterness towards their recent foes had not lingered in their hearts and been exhibited in their conduct. A proud and brave people feel more keenly than others the sting of defeat. Undoubtedly much misconception and falsehood were mingled with the statements made respecting their action; nevertheless, they led to the introduction into Congress of the proposition for the Fourteenth Amendment. The discussion which followed indicated that the purpose of its framers and advocates was to obviate objections to legislation similar to that contained in the first section of the Civil Rights Act, and to prevent for the future the possibility of any discriminating and hostile State legislation against any one.

Mr. Stevens, of the House of Representatives, in presenting the proposition, after stating the provisions of the first section, said: "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other in our declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States so far *that the law which operates upon one man shall operate equally upon all.*" In reply to an objection that the first section of the amendment was in substance the Civil Rights bill, which Congress had passed over the Presi-

dent's veto, and that by voting to so amend the Constitution as to put the bill into it, was to admit that the bill was unconstitutional, Mr. Garfield, then also a member of the House, said: "We propose to lift that great and good law above the reach of political strife, beyond the reach of plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the Civil Rights bill unconstitutional, I am glad to see that first section here."

Though the occasion of the amendment was the supposed denial of rights in some States to newly-made citizens of the African race, and the supposed hostility to Union men, the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile State action of any kind. Its effect, in preserving free institutions and preventing harsh and oppressive State legislation, can hardly be overstated. When burdens are placed upon particular classes or individuals, whilst the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law, operating equally upon all, will soon create a movement for its repeal. With the amendment enforced, a bad or an oppressive State law will not long be left on any statute-book.

The argument that a limitation must be given to the scope of this amendment, because of the circumstances of its origin, is without force. Its authors, seeing how possible it was for the States to oppress, without relief from the Federal Government, placed in the Constitution an interdict upon their action, which makes lasting oppression of any kind by them under the form of law impossible.

The amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others.

The provision of the Constitution prohibiting legislation by States impairing the obligation of contracts, had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws passed by the States soon after the revolution, when their finances were embarrassed and their people were overwhelmed with debts. These laws, according to Story, prostrated all private credit and all private morals, and led to the adoption of the prohibition, by which such legislation was forever prevented. But in its construction the provision has not been limited to mere commercial contracts. In the Dartmouth College case it

was urged that the charter of the college was not a contract contemplated by the Constitution, because no valuable consideration passed to the King as an equivalent for the grant, and that contracts merely voluntary were not within the prohibition. But Chief Justice Marshall, after showing that the charter was a contract upon a valuable consideration, said: "It is more than possible that the preservation of rights of this description was not particularly in view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State Legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given"; and again: "The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." (4 Wheat. 644.)

Following that authority, we cannot adopt the narrow view for which counsel contend, and limit the application of the prohibition of the Fourteenth Amendment to legislation touching members of the enfranchised race. It has a much broader operation. It does not, indeed, place any limit upon the subjects, in reference to which the States may legislate. It does not interfere with their police power. Upon every matter upon which, previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order, and peace of the community, to develop their resources, increase their industries, and advance their prosperity; but it does require that in all such legislation, hostile and partial discrimination against any class or person shall be avoided; that the States shall impose no greater burdens upon any one than upon others of the community under like circumstances, nor deprive any one of rights, which others similarly situated are allowed to enjoy. It forbids the State to lay its hand more heavily upon one than upon another under like conditions. It stands in the Constitution as a perpetual shield against all unequal and partial legislation by the States, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.

The adoption of the Federal Constitution met, as all know, with most determined opposition from a large class, who believed that the exercise of the powers delegated to the general Government would cripple and embarrass the States in the administra-

tion of their local affairs. The dread of centralization disturbed the minds of some of the purest and greatest statesmen of the day. This feeling continued after the adoption of the Constitution, and finally led to the first ten amendments. The population of the country was sparse; each State afforded security to its people, and was to them the special object of attachment. They enjoyed under its laws protection in their property, in their homes, and in their business. They felt a natural distrust of a power wielded by officers not selected by themselves. They apprehended that the rights which they enjoyed might be encroached upon, if not destroyed. So the amendments proposed contained limitations upon the powers of Congress; many of which were indeed unnecessary, but were adopted in order to prevent "misconception or abuse of the powers of the general Government." They declared, among other things, that certain liberties should not be abridged, such as the free exercise of religion, the freedom of speech and of the press; that certain rights should not be taken away, such as the right of the people to peaceably assemble and petition for a redress of grievances, and to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that certain securities against wanton prosecution for public offenses should not be withdrawn, such as that no person should be held to answer for a felony, except upon the presentment or an indictment of a grand jury; that in all prosecutions, the accused should have the benefit of a speedy trial; should be informed of the nature and cause of the accusation; should be confronted with the witnesses against him, and should have compulsory process for obtaining witnesses, and the assistance of counsel; that certain guarantees against oppression of person and spoliation of property should not be violated, such as that no person should be deprived of life, liberty, or property without due process of law, and that private property should not be taken for public use without just compensation; that the enumeration in the Constitution of certain rights, should not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States, respectively, or to the people. These were all restraints upon the general Government. Had the population of the United States continued as sparse as when the Constitution was formed, and the means of more rapid intercourse between the States had not been invented, it is possible that further amendments would not have been demanded. But the immense development of the resources of the country, the great increase of population, the constant intercourse between the States by steamer, railway and telegraph, changed the business and commercial relations of the States to each other, and led the people of one section to seek a closer union, and to desire a greater authority to be exercised by the central Government,

whilst the peculiar institutions of the other section, and the different industries they developed, led its people to desire to limit, rather than to strengthen the central authority. Differences of opinion in matters of internal policy, and the estrangement engendered by controversies growing out of the existence of slavery in some of the States, ultimately culminated in civil war. Men then saw that danger was to be apprehended in a direction opposite to that which led to the original amendments. Restraints upon the power and action of the States were, therefore, suggested, and to impose them and to abolish slavery, the great cause of the civil conflict, the new amendments—the Thirteenth, Fourteenth and Fifteenth—were adopted. “While, therefore,” to quote the language of an admirable writer and eminent jurist, Judge Cooley, “the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints on State sovereignty, at a time when State powers had nearly succeeded in destroying the national sovereignty. Of these amendments, it may be safely affirmed, that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the States the surrender of no power which any free government should ever employ.” It would tend, therefore, to defeat the great purpose of the late amendments, if to any of them, we should give the narrow construction for which counsel contend.

Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this State they are formed under general laws; and the Civil Code provides that they “may be formed for any purpose for which individuals may lawfully associate themselves.” Any five or more persons may by voluntary association form themselves into a corporation. And as a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theatres; they set up manufactories and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accident on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help

the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over five hundred corporations in this State; there are thirty thousand in the United States, and the aggregate value of their property is several thousand millions.* It would be a most singular result, if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the States, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the Supreme Court of the United States, and of the several States, that whenever a provision of the Constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the Courts will always look beyond the name of the artificial being to the individuals whom it represents.

The case of the *Society for the Propagation of the Gospel in Foreign Parts vs. The Town of New Haven*, reported in the 8th of Wheaton, furnishes an apt illustration of this doctrine. The sixth article of the treaty of peace with Great Britain of 1783 provided that there should be "no future confiscations made nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property." An English corporation claimed the benefit of this article with reference to certain lands in Vermont granted to it before the revolution, which the Legislature of that State had undertaken to give to the town where they were situated. It was contended that the treaty only applied to natural persons; that it did not embrace corporations, because they were not persons who could take part in the war, or could be considered British subjects, but the position was held to be untenable. The Court, speaking through Mr. Justice Washington, said that the argument proceeded upon an incorrect view of the subject, and referred to the case of *The United States vs. Deveaux*, (5 Cranch, 86), to show that the Court, when necessary, will look beyond the name of a corporation to reach and protect those whom it represents.

The Constitution, in defining the judicial power of the United States, declares that it shall extend to "controversies between citizens of different States," and in the case referred to by Mr. Justice Washington, the question arose whether a corporation composed of citizens of one State could sue in the Circuit Court of the United States a citizen of another State, and it was held

*The number of corporations here stated is much less than the number actually existing. There are over five thousand corporations in California alone.

that it could. In deciding the question, the Court, speaking through Chief Justice Marshall, said: "However true the fact may be that the tribunals of the State will administer justice as impartially as those of the Nation to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens or citizens of different States are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this Court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The same point was presented in another form in the case of *Marshall vs. Baltimore and Ohio Railroad Company* (16 How. 326.) There the question was whether a citizen of one State could sue in the Circuit Court of the United States a corporation of another State, and a similar conclusion was reached. After referring to the clause of the Constitution, extending the judicial power of the United States to controversies between citizens of different States, the Court proceeded to consider the objections urged to treating a corporation as a citizen, so far as it might be necessary to protect the corporators: "A corporation," observed Mr. Justice Grier, speaking for the Court, "it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises, which cannot be denied. But a citizen who has made a contract, and has a controversy with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners."

"The necessities and conveniences of trade and business re-

quire that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued in a fictitious or collective name. But these important faculties, conferred on them by State legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."

The Fifth Amendment to the Constitution declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

From the nature of the prohibitions in this amendment, it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and, therefore, it might be said with much force that the word person there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the Courts. A similar provision is found in nearly all of the State Constitutions; and everywhere, and at all times, and in all Courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense; and whatever affects the property of the corporation necessarily affects the commercial value of their interest. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds, and money, no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it which the Courts will pro-

tect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the State takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly the corporation is deprived of its property; but, at the same time, in every just sense of the constitutional guaranty, the corporators are also deprived of their property.

The prohibition against the deprivation of life and liberty in the same clause of the Fifth Amendment does not apply to corporations, because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation.

Nor do all the privileges and immunities of citizenship attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The status of citizenship, entitling the citizen to certain privileges and immunities in the several States, does not belong to corporations. The special privileges which citizens acquire by becoming incorporated in one State cannot, therefore, be exercised in another State without the latter's consent, as was held in *Paul vs. Virginia*, (8 Wall. 168), although such consent will generally be presumed in the absence of positive prohibition.

Decisions of State Courts, in harmony with the views we have expressed, exist in great numbers. But it is unnecessary to cite them. It is sufficient to add that in all text-writers, in all codes, and in all revised statutes, it is laid down that the term person includes, or may include, corporations, which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the Courts will look through the ideal entity and name of the corporation to the persons who compose it and protect them, though the process be in its name. All the guaranties and safeguards of the Constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the Fourteenth Amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained. The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortgage thereon, is to that extent invalid.

If there were no other objection to the assessment we might perhaps order judgment for the amount of taxes due upon the valuation of the property, after deducting therefrom the amount of the mortgage; but there is another objection of equal significance, which goes to the validity of the whole assessment. No opportunity was afforded to the defendant to be heard respecting

it before the State Board of Equalization. It was made by the Board under the tenth section of Article XIII. of the Constitution, which declares that "the franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships and districts."

Other articles of the Constitution, and laws supplementing their directions, provide for the assessment by county officers of all property except "the franchise, roadway, roadbed, rails, and rolling-stock" of railroads operated in more than one county, for a hearing by property holders respecting the assessment, and for its equalization by county boards. Ample security is thus afforded to individuals against erroneous and arbitrary assessments. But the assessment of the property mentioned of railroads operated in more than one county is placed entirely with the State Board. In *People vs. Supervisors of Sacramento County*, the Supreme Court of the State said that: "It is the manifest intent of the Constitution that the valuation of the railroad property mentioned in Section 10 of Article XIII. shall be finally fixed and determined by the State Board of Equalization. The State Board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a system for the assessment of railroads operated in more than one county, which is separate and distinct from that provided for the assessment of other property;" and, again, "The portion of the section quoted (the portion above) is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited it would be dispelled by the first clause of the same section: 'All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated in the manner prescribed by law.' Thus by the very language of the Constitution all other but the railroad property mentioned must be assessed by local assessors, in the manner prescribed by statute. The railroad property must be assessed in the manner prescribed by the section of the Constitution, that is, by the State Board, without the aid of statute." (*Pacific Coast Law Journal*, vol. 8, 103.)

The Political Code provides that the assessment shall be made by the State Board on or before the first Monday in May of each year; that the President, Secretary, Cashier, or Managing Agent, or such officer of the corporation as the Board may designate, shall furnish to the Board, on or before the first Monday of April

of the year, a statement signed and sworn to by him, showing in detail the whole number of miles of railway owned, operated, or leased in the State by the corporation, and the value thereof per mile, and all its property of every kind located in the State, the number and value of its engines, passenger, mail, express, baggage, freight and other cars, or property used in operating or repairing the railway in the State, and on railways which are parts of lines extending beyond its limits, the amount of the rolling-stock in use during the year, the annual gross earnings of the entire railway and the proportionate annual gross earnings of the same in the State, and such other facts as the Board may in writing require; and that if the officer or officers designated fail to make and furnish such statement, the Board shall proceed to assess the property, and the valuation fixed shall be final and conclusive. The law also provides that the property shall be assessed at its actual value; that the assessment shall be made of the entire railway in the State, including the right of way, road-bed, track, bridges, culverts and rolling-stock; that the State Board shall transmit to the County Assessor of each county through which the railway runs a statement showing the length of its main track within the county, and its assessed value per mile as fixed by a *pro rata* distribution per mile of the assessed value of the whole property; that this statement shall be entered on the assessment-roll of the county, and that at their first meeting after its receipt by the County Assessor, the Board of Supervisors of the county shall cause an order to be entered in the proper record book stating the length of the main track, and the assessed value of the railway lying in each city, town, township, school district, or lesser taxing district in the county, through which the railway runs, as fixed by the State Board, which shall constitute the taxable value of the property for taxable purposes in the district, and that such property shall be taxed at the same rates as the property of individuals.

We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that the Supreme Court of the State intended by the decision cited to hold that the 10th Section of the XIIIth Article is self-executing, except to the extent that it vests complete power in the State Board to make the assessment of the property; not that legislation may not be had providing for the mode in which the powers of the Board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately no such legislation has been had. The attempted legislation failed because it did not receive in the Legislature the constitutional majority, as is clearly shown by the Circuit Judge in his opinion. It is unnecessary to go over the ground he has completely covered.

The presentation to the State Board by the corporation of a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in Court can dispense with the right of the suitor and his contestant to be there heard.

There being, then, no provision of law giving to the company notice of the action of the State Board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property, in the enforcement of the tax levied according to the assessment, be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value accurate knowledge upon a multitude of subjects, not usually possessed without special study. We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an opportunity of being heard against the proceeding. The principle is as old as Magna Charta, and is embodied in all the State Constitutions, and in the Fourteenth Amendment of the Federal Constitution. The provision in this amendment is in the form of an interdict upon the States: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." And by *due process* is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but *due process*. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction.

It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation; and, in some cases, it may be given by statute; but given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so, also, where title or possession of property is in contention. But in the taking of property by taxation, the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the Courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted; and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding.

In *Davidson vs. New Orleans* the Supreme Court of the United States assumed this position to be unquestionable. In that case an assessment levied on certain real estate in New Orleans, for draining the swamps of that city, was resisted on the ground that the proceeding deprived the owners of their property without due process of law; and the Court refused to disturb it, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the Courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition which would be at once perspicuous, comprehensive and satisfactory, the Court, speaking through

Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community; and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary Courts of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case; the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." (96 U. S. 104.)

In *Stuart vs. Palmer* the meaning of these terms is elaborately considered by the Court of Appeals of New York, with reference to numerous adjudications on the subject. In that case a law of the State imposed an assessment on certain real property for a local improvement, without notice to the owner, and a hearing, or an opportunity to be heard by him, and the Court held that it had the effect of depriving him of his property without due process of law, and was therefore unconstitutional. Mr. Justice Earl, speaking for the Court, said: "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And again, that: "No case, it is believed, can be found in which it was decided that this constitutional guaranty" (against depriving one of his property without due process of law) "did not extend to cases of assessments; and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of

the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." (74 N. Y. 188 and 195.) We concur fully in the views thus forcibly expressed.

It remains to consider the last position of counsel, that the provisions of Article XIII. of the Constitution of the State, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations. On the hearing this position seemed to us to possess some force, but on careful consideration its supposed force is dissipated. The argument is, that on the original creation of the corporations the State might have imposed any conditions whatever as to the manner and the amount in which the property should be taxed; that under the reserved power of amendment of the law creating the corporations, the State could at any time afterwards impose such a condition; that the new Constitution, in continuing the defendant and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a valuation different from that at which the property of individuals is assessed, imposed that condition upon them, and that the subsequent exercise of its franchises by the defendant implies an assent to such condition.

There are two answers to this argument. In the first place, Article XIII. is not intended to make any change in the powers or rights of corporations under the laws of the State. It treats entirely of revenue and taxation, and of the rules which shall govern the assessment of the property of individuals and of railroad and other quasi public corporations. It is in another article that provisions are made for the control of railroad corporations; and the duties and responsibilities of corporations generally, and the power of the State over them, are declared.

In the second place, the State in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the Federal Constitution. It cannot impose the condition that they shall not resort to the Courts of law for the redress of injuries, or the protection of their property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law; or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business, and of having per-

petual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications; and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation; it cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances.

The State grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant the depots along side of it; it does not grant the cars on the track nor the engines which move them; and over them it can exercise no power, except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise—that is, over that which is granted—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. The Supreme Court established in the Dartmouth College case that the charter of a private corporation is a contract between the corporations and the State, and that it was, therefore, within the prohibition of the Federal Constitution against the impairment of contracts. To avoid this result the States have generally inserted clauses in their Constitutions reserving a right to repeal, alter, or amend charters granted by their Legislatures; or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which without such reservation would be irrevocable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business.

The case of *Detroit vs. Detroit and Howell Plank Road Company*, in the Supreme Court of Michigan, is in point on both of the propositions stated. An Act of the Legislature of the State, amending the charter of the company, required it to remove without the limits of the city of Detroit a toll-gate on its road, even within the limits. The effect of the Act was to take from the company about two and a half miles of its road, upon which

it collected tolls. The Act under which the company was incorporated reserved a power in the Legislature to repeal and amend it at any time, and the question was whether, under this reservation, the Legislature could require the removal of the toll-gate out of the city, and it was held that it could not. Ordinarily a law requiring the removal of a toll-gate from one place to another on a road would be a mere police regulation, but here it was something more; it deprived the company of compensation for the use of its road within the city limits—that is, for a large part of the travel over it. The Court, speaking through Mr. Justice Cooley, observed that there were cases in which amendments to charters having some resemblance to this had been sustained; and cited several which involved a mere police regulation, such as requiring a railroad company to build a station-house and stop its trains at a certain locality; to permit and provide for the crossing of its track; and to unite with others in a common passenger station for trains entering a city. “But,” the Court added, “there is no well-considered case in which it has been held that a Legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany, etc. R. R. Co. vs. Brownell* (24 N. Y. 345) is an illustration. It was there decided that although the Legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with the provision for compensation. The decision was in accord with that in *Commonwealth vs. Essex Co.* (13 Gray, 239, 253), in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that ‘no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.’ The same doctrine is clearly asserted in *Railroad Company vs. Maine* (96 U. S. 499), and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases* (99 U. S. 700).

“But for the provision of the Constitution of the United States, which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any

property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State, it is enough that it has become private property, and it is then protected by the 'law of the land.'" (43 Mich. 140-147.)

We have already extended this opinion to a great length, and we do not think it necessary or important to notice other positions urged by counsel, with great learning and ability, against the validity of the taxes for which the present action is brought. We are satisfied that the assessment, upon which they were levied, is invalid and void, and judgment must be accordingly entered on the demurrer for the defendant, and, by stipulation of parties, the judgment must be made final.

CONCURRING OPINION.

SAWYER, Circuit Judge: The facts of this case are fully stated by Mr. Justice Field, and need not be repeated here. The questions presented are of the gravest character, and of the utmost importance to the people of California. While I concur in the conclusions, and in the line of argument adopted by my associate, I shall also state, as briefly as I reasonably can, considering the gravity of the questions discussed, my views upon the points involved.

1. In my judgment the word "person," in the clause of the Fourteenth Amendment to the National Constitution, "No State shall * * * deprive any *person* of life, liberty or property, without due process of law, nor deny to any *person* the equal protection of the law," includes a private corporation. It must, at least, through the corporation, include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation, in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a corporation, does not prevent them from having a right of property in the assets of the corporation, which is entitled to the protection of this clause of the Constitution. Nor does the intervention of this artificial being between the real beneficial owners and the State, for the simple purpose of the convenient management of the business engaged in, enable the State, by acting directly upon the legal entity, to deprive the real parties beneficially interested of the protection of these important provisions. In the language of Mr. Pomeroy, one of the counsel, which I adopt: "Whatever be the *legal* nature of a corporation as an artificial, metaphysical being, separate and distinct from the individual members, and whatever distinctions the common law

makes, in carrying out the technical legal conception, between property of the corporation and that of the individual members, still, in applying the fundamental guaranties of the Constitution, and in thus protecting rights of property, *these metaphysical and technical notions must give way to the reality.* The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators.* A State Act depriving a business corporation of its property without due process of law does, *in fact, deprive the individual corporators of their property.* In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons."

This principle is recognized, and the question settled for all time in an early case by Chief Justice Marshall, in which he says: "Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien, or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, *in fact and in law, between those persons suing in their corporate character by their corporate name for a corporate right, and the individuals against whom the suit may be instituted.* Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals." (*Bank U. S. vs. Deveaux*, 5 Cr., 87.) It is upon this principle that the national Courts have ever since entertained jurisdiction, on the ground of citizenship, of the corporators in cases wherein corporations are the parties to the record. The cases in the Supreme Court upon this point are numerous, and too familiar to require further citation. In *Society, etc. vs. New Haven*, (8 Wheat. 464-489,) it was held that a corporation was protected under the Sixth Article of the Treaty with England of 1783, which reads: "There shall be no confiscations made, nor any prosecutions commenced against any *person* or *persons* for or by reason of the part which he, or they, may have taken in the present war, and that no *person* shall, on that account, suffer any future loss or damage, either in person, liberty, or property," etc. The word "person," in the Civil Rights Act of Congress of April 20th, 1870, (17 Stat. 13,) was held on the circuit to include a corporation. (*North West Fert. Co. vs. Hyde Park*, 3 Biss. 481.) In *Railroad Company vs. Richmond*, (96 U. S. 529) the Supreme Court assumes that a corporation is included in the word "person," as thus used in the Fourteenth Amendment.

The word "person" is, unquestionably, much broader in its signification than the word "citizen," and the change from the

word "citizen," in the first clause of the section, to the word "person," of so much larger import in the last, must have been well considered; and have been intended to extend the shield of the Constitution to all cases which might require the protection of this wholesome and greatly needed guaranty. There is nothing in the context to indicate a purpose to limit the meaning of the word person to a narrower sense than the word ordinarily and naturally imports; or to make the application of the provision partial only. To exclude corporations from its import, would be to leave, perhaps, at this day, the far larger portion of the vast capital of the country employed in great enterprises, either commercial, manufacturing, mining, or otherwise, beyond the pale of its protection. There is no good reason for excluding the property of corporations from the protection extended to other property. It is subject to all the burdens, and it should be entitled to all the immunities of other property. It is, at last, the property of natural persons. The provision is protective and remedial, not punitive in character, and should, therefore, be *liberally, not strictly*, construed. No restriction should be put upon the terms not called for by the exigencies of the case, or by the public interests; and it must be manifest that the public interest requires that the broadest signification should be adopted. Blackstone treats of corporations under the head of Rights of Persons—chapter XVIII, under this head, being devoted to the subject. He says: "Persons, also, are divided by law into either natural persons or artificial," giving a definition of each. (Book I, 123.) So, also, does Kent, (2 vol. 316). In *United States vs. Amedy*, (11 Wheaton, 412,) wherein a person was indicted, under an Act of Congress, for destroying a vessel belonging to a corporation, the Supreme Court held, that a corporation is a person within the meaning of the Act. The Court, among other things, says: "The mischief intended to be reached by the statute is *the same*, whether it respects private or corporate persons. *That corporations are in law, for civil purposes, deemed persons, is unquestionable.*" And the Court in this case holds the same for criminal purposes also; and in criminal cases statutes are *strictly* construed. So in regard to the provisions of the Fourteenth Amendment under consideration, "*the mischief intended to be reached*" by the amendment "*is the same, whether it respects private or corporate persons.*" (See also cases cited in the opinion.) The authorities to a similar effect are numerous. (See, as examples, *People vs. Ins. Co.*, 15 John. 588; *Planters' Bank vs. Andrews*, 8 Porter, 404, Kyd on Corp. 15; *Douglass vs. Pacific Mail Steamship Co.*, 4 Cal. 304; *State vs. Nashville University*, 4 Humph. 166.) There are many other cases affording support, more or less direct, to this view.

In *Insurance Co. vs. New Orleans*, (1 Woods, 85,) it was held on the circuit that a corporation is not embraced in the word "person," as used in the amendment under consideration, and

the Supreme Court of California, upon the authority of that case, made a similar ruling in *Central Pacific Railroad Co. vs. The State Board of Equalization*, (8 Pacific Coast Law Journal, 1155.) But notwithstanding their high character for ability, and my respect for the decisions of the judges expressing that opinion, I am compelled, both upon reason and authority, to think that the other is the better view. Again, with respect to corporate property, I adopt the language of counsel, which expresses my view accurately and clearly: "*The property of the corporation is in reality the property of its individual corporators. A State statute depriving a corporation of its property does deprive the individual corporators of their property. These clauses of the Fifth and Fourteenth Amendments, and the similar clauses of the State Constitution, apply, therefore, to private corporations, not alone because such corporations are 'persons,' within the meaning of that word, but also because statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guaranties, corporations cannot be separated from the natural persons who compose them.*" The decision in *Dodge vs. Woolsey*, (18 How. 331,) which establishes the right of stockholders to maintain a suit against the directors of the corporation and State officers to restrain the payment by the one, and the collection by the other, of a tax illegally assessed against the corporation rests upon this principle. See, also, *Marshall vs. Baltimore and Ohio Railroad Co.*, (16 How. 327.) But a corporation itself is, in my judgment, a "person," within the meaning of the constitutional provision in question. Such has been the ruling in all cases under statutes containing the word "person," unless the context clearly indicated a more limited signification.

2. I shall not spend much time in discussing the question whether the Fourteenth Amendment applies only to the African race. Undoubtedly, the negro furnished the immediate occasion and motive for the adoption of the amendment; but its benefits could not have been intended to be limited to the negro. The protection afforded is as important to others as to him, as is clearly shown by experience under this provision. A whole race, not African, large numbers of whom came to our shores under the solemn guaranties of stipulations in a treaty suggested and sought, and in great part framed by ourselves, to promote our then supposed interests, were among the first to invoke this very provision of the Fourteenth Amendment, to protect them, under the word "person," in the right to earn an honest living, by honest labor; and its protecting power was not invoked in vain. (*Parrott's Chinese Case*, 6 Saw. 349; *In re Ah Chong*; *Chinese Fisherman Case*, 6 Saw. 451.) Who, in view of past experience, shall say there was no occasion to extend the signification of the word, person, beyond the negro? And are all other races, including our own, to be now withdrawn from its protecting power by so

narrow and unnatural a construction? I apprehend not. If the line cannot be drawn at the negro, then no other can be adopted that will not embrace every human being in his individual character, or in his legal association with his fellows for the more convenient administration of his property, and more successful pursuit of happiness. I apprehend that it would have struck the world with some astonishment, when this amendment was proposed to the people of the United States for adoption, if it had read: "Nor shall any State deprive any person of the negro race of life, liberty, or property, without due process of law; nor deny to any person of the negro race within its jurisdiction the equal protection of the laws." Yet so it must, in effect, be read, if its operation is to be limited to that race. The rights of the negro are, certainly, no more sacred or worthy of protection than the rights of the Caucasian or other races; and the security of the rights of corporations, and, through them, the rights of the real parties—the corporators—is as of great public importance as the security of any other private interest.

3. Does the assessment in question, made in strict pursuance of the provisions of the Constitution of California, violate that clause of the Fourteenth Amendment of the National Constitution which says that no State "shall deprive any person of life, liberty or property, without due process of law?" The provision of the State Constitution under which the assessment was made is as follows: "The franchise, roadway, roadbed, rails and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of roadway laid in such counties, cities and counties, cities, towns, townships and districts." This is the only provision affecting this question. To take one's property by taxation is to take or deprive one of his property; and if not taken in pursuance of the law of the land—in some due and recognized course of proceedings, based upon well-recognized principles in force before, and at the time this clause was first introduced into the various Constitutions and the legislation of the country—is to take it "without due process of law." The signification of these words has been the subject of judicial consideration and discussion in a vast number of cases; and their import has been determined to be the same as that of equivalent phrases in *Magna Charta*, from which the principle adopted was derived.

I shall not attempt to give an accurate definition of the terms "due process of law," applicable to all cases. It is not necessary for the determination of this case to do so. It is enough to say that it has been settled by judicial decision, that whether a proceeding be judicial, administrative, or legislative, if it

affects life or liberty, or takes property directly, or imposes a charge which becomes the basis of taking property, some kind of notice, or opportunity to be heard on his own behalf and to defend his rights, given to the person whose life or liberty is to be affected, or whose property is to be taken or burdened with the liability, is an indispensable element—an essential ingredient—of “due process of law.” No one, I apprehend, would for a moment contend that a man’s life or his liberty could be legally taken away without notice of the proceeding, or without being offered an opportunity to be heard; or that a proceeding whereby his life or liberty should be forfeited, or permanently affected, without notice or opportunity to be heard in his own defense, could, by any possibility, be by “due process of law.” In such cases there could be no just conception of “due process of law” that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into and constitute an essential part of due process of law, in respect to life and liberty, they must also constitute essential ingredients in due process of law where property is to be taken; for the guaranty in the Constitution is found in the same provision, in the same connection, and in the identical language applicable to all. One meaning, therefore, cannot be attributed to the phrase, with respect to property, and another with respect to life and liberty.

Having stated the principle, which I conceive to be established by an unbroken line of authorities, I shall refer to some of them. One of the latest and most instructive cases upon the subject was recently decided by the Court of Appeals of the State of New York, from which I shall extract a passage, which I adopt, as expressing my own views and presenting the question in a very clear and satisfactory light. It involved the validity of an assessment for a public street improvement, and but one question, which was decisive of the case, was examined, or determined. The question was as to the validity of the law under which the assessment was made. The Court, by Mr. Justice Earl, says: “The latter assessment could be made without any notice to, or hearing of, any person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the Commissioners to make the assessment without any notice or hearing.” (*Stuart vs. Palmer*, 74 N. Y. 186.) The Judge proceeds: “I am of the opinion that the Constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. *It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require a notice to them and give them a right to a hearing, and an opportunity to be heard.* It matters not upon the

question of the constitutionality of such a law that the assessment has in fact been fairly apportioned. *The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done.* The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice. (*Ib.* 188.)

* * * * *

"The Legislature can no more arbitrarily impose an assessment for which property may be taken or sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislature cannot do nor authorize to be done. 'Due process of law' is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights." (*Ib.* 190.) * * * *

"No case, it is believed, can be found in which it was decided that the constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of Judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." (*Ib.* 195.)

Much more is worth quoting, but it would extend this opinion to an unreasonable length.

Thus, it is determined in the case cited, that a party is not only entitled to notice and an opportunity to be heard, but that the law, or Constitution itself, must expressly provide for notice. This decision was approved by the Supreme Court of California October last, in *Mulligan vs. Smith*, involving the validity of a

tax. (8 Pacific Coast Law Journal, 499.) Said McKinstry, J.: "In my opinion, the statute provides no notice or process by means of which the property-owners can be subjected to the judgment of the County Court. *The act is, therefore, void;*" citing *Stuart vs. Palmer*, *supra*; Cooley on Taxation, 266, and other cases; and McKee, J., in the same case, said: "It is a principle which underlies all forms of government by law, that a citizen shall not be deprived of life, liberty, or property without due process of law. The Legislature has no power to take away any man's property, nor can it authorize its agents to do so, *without first providing for personal notice to be given to him, and for a full opportunity of time, place, and tribunal, to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature.*"

In *Patten vs. Green*, (13 Cal. 329,) Mr. Justice Baldwin, all the Justices, including Mr. Justice Field, concurring in the opinion, said: "We think it would be a dangerous precedent to hold that an absolute power resides in the Supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power." The raising of the tax by the Board of Equalization was held void for want of notice. Mr. Webster, in the Dartmouth College case, defined due process of law, or "the law of the land," as "the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." He adds: "Every thing which may pass under the form of an enactment is not 'the law of the land.'"

In *Cooper vs. Board of Works*, 108 Eng. C. L. R. 181, in which was in question the action of the Board of Public Works, in pursuance of a statute which did not require notice, Willes, J., said: "I apprehend that a tribunal, which is by law invested with power to *affect the property* of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds. And that that rule is of universal application, and founded upon the plainest principles of justice." In the same case, Byles, J., said: "The judgment of Mr. Justice Fortescue, in Dr. Bentley's case, is somewhat quaint, but is very applicable, and has been the law from that time to the present." He says: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defense. 'Adam, where art thou! Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not

eat?" (See, also, *Philadelphia vs. Miller*, 49 Pa. 448; *Matter of Ford*, 6 Lans. 92; *Overing vs. Foote*, 65 N. Y. 263; *Westervelt vs. Gregg*, 12 N. Y. 209; *Cooley Const. Lim.* 355; *Buller vs. Sup. Sag.*, 26 Mich. 22, 29; *Sedgwick's Stat. and Constitutional Construction*, Pomeroy's Ed, 474, *et seq.*, and notes; *Cooley on Taxation*, 266, 267.)

In *Davidson vs. New Orleans*, 96 U. S. 97, it was not questioned, but assumed, that the party taxed must have an opportunity to be heard, and the case was decided upon that theory.

In my judgment, the authorities establish, beyond all controversy, that somewhere in the process of assessing a tax under a law, or a State Constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute, or the State Constitution, must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and to be heard upon them. In some form or manner, he must be afforded an opportunity to defend his interests. In this case the Constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer.

4. On behalf of the plaintiff, what purports to be a statute passed March 14, 1881 (Statutes 1881, p. 84), is cited, which, it is insisted, supplements the Constitution, and provides for a notice and hearing upon a petition filed within five days after the assessment is made upon a railroad. But it is claimed that, although published in the volume of statutes for the year 1881, as a statute, the bill never constitutionally passed, and that it is, consequently, no law. Section 15 of Article IV of the Constitution of California provides, "that on the final passage of all bills they shall be by yeas and nays upon each bill separately, and shall be entered on the journals, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under Section 5 of the same article the House consists of eighty members, of whom it would require forty-one to constitute a majority of the members elected to the House. Upon reference to the published journals of the Legislature, it appears that the bill in question passed the House and was sent to the Senate, where it was amended by adding a long provision, being the very provision, if any there is, which gives the owners of railroads of the class in question, dissatisfied with the assessment, a right to file a petition, "within five days after the assessment is made and entered of record on the books of the board," to have the assessment corrected, and providing for proceedings upon said petition. On March 4, the House considered the Senate amendment, and upon a call of the yeas and nays, as required by the Constitution, *thirty-nine* members voted for the amendment, and *thirty-two* against it, there being four *absent* and not voting; thus the votes in favor of the amendment

were two less than a majority of members elected to the House, and the bill failed. It does not appear that the bill "was read at length." The speaker declared that this was not the final action of the House, and that the amendment concurred in by a vote of 39 yeas to 32 nays was adopted. An appeal having been taken from this decision of the chair, it was afterwards laid upon the table. Thereupon two members filed each a separate protest against the decision of the Speaker, and the certificate that the bill had passed, on the expressed ground, that it did not receive the vote of a majority of the members elected to the House. All this appears upon the journal. If this was not the final action of the House, then, as there was no further action, the Act never *finally* passed, even by the numbers indicated. (Assembly Journal, 24th Session, p. 472-5.)

The bill, therefore, never was constitutionally passed, and never became a law. Whether the bill became a law is a question of law of which the Court will take judicial notice. (*Sherman vs. Story*, 30 Cal. 253; *Ottawa vs. Perkins*, 94 U. S. 268; *Gardner vs. The Collector*, 6 Wall. 509-10; *Post vs. Supervisors*, 105 U. S. 667.) Under the decisions of the Courts upon constitutional provisions, in all respects similar to that in the present Constitution of California, it is settled, that the Court, to inform itself, will look to the journals of the Legislature. So the Supreme Court of the United States holds where it is so decided by the State Courts in construing their own Constitutions and laws. (See cases last cited.) I am not aware of any decision of the Supreme Court of California giving a different construction to the State Constitution as it now stands. Unless this mode is adopted of resorting to the journals to ascertain whether a statute has been legally passed or not, experience, and the number of cases that have already arisen under similar constitutional provisions, demonstrate, that the requirement of the Constitution, that the vote shall be taken by yeas and nays, and a majority of the members required to vote in the affirmative on the final passage of an Act, would be of little avail. While we think the case of *Sherman vs. Story* correctly decided under the Constitution as it then was, we are of the opinion that the change in the Constitution requires a change in the rule, and such seems to be the opinion of the Supreme Court of California in *Weil vs. Kenfield*, 54 Cal. 111. When California adopted from other States the provision now found in its Constitution, substantially as found in the Constitution of Illinois, it must be deemed to have adopted with the provision the settled construction put upon it by the Courts of the State from which it was taken. The leading cases upon the point are *Spangler vs. Jacoby*, 14 Ill. 278; *Prescott vs. Board of Trustees, &c.*, 19 Ill. 326; *Osborn vs. Staley*, 5 West Vir. 89, and the cases cited in *Sherman vs. Story*, and in those from the United States Supreme Court. In this case there is something more than an omission in the

journals, for it affirmatively appears what the vote was, and that the bill did not pass by the vote required by the Constitution.

Statutory provisions have also been adopted, which appear to be designed to give effect to this change in the Constitution. Section 255 of the Political Code requires the Minute Clerks of the Senate and Assembly to "keep a *correct* record of the proceedings of their respective Houses." And Sections 256 and 257 require the daily proceedings to be recorded *in the journals*, and that they "must be read by the Secretary each day of meeting, and then be authenticated by the signatures of the President and Speaker of the respective Houses." Section 1875 of the Code of Civil Procedure provides that "Courts take judicial notice of the following facts: * * Public and private official acts of the *legislative*, executive, and judicial departments of this State and of the United States," etc. * * "In all these cases the Court may resort for its aid to appropriate books or documents of reference." Section 1888 provides that "Public writings are: 1. The written acts or records of the acts of the sovereign authority of official bodies and tribunals, and of public officers, *legislative*, judicial, and executive, whether of this State or of the United States," etc. And Section 1918 provides that "official documents may be proved as follows: * * 2. The proceedings of the Legislature of this State, and of Congress, by the *journals* of those bodies respectively, or either House thereof, or by published statutes or resolutions." Thus the journals of the Legislature are put upon the same footing as the statutes. We think there can be no doubt, under the Constitution of the State, and these statutes, that we may look to the journals to see what action was in fact had with respect to any apparent law, as published in the volumes of the statutes of the State; and looking to the journals, it affirmatively appears that the Act upon the statute book in question never did become a law.

Even if the Act had passed, it is at least extremely doubtful whether the notice, or time for filing the petition, is sufficiently definite to be of any effect. The assessment, under the provision, might be made—even if the party is bound to notice the state of the record on the first Monday of May—the five days might elapse, and the assessment be transmitted to the county before the party assessed would know, under the law, that it had been made. All the acts of assessment may have transpired and the assessment become final before the first Monday of May. The Board, however, is not required to make it before that day, although it might do so, and the party assessed can scarcely be expected to watch its proceedings, from day to day, before the time fixed by the law.

There being, then, no such statute as is relied on in existence, the validity of the assessment must rest alone upon the Constitutional provision quoted and the Act of 1880, adding Sections

3664 and 3665 to the Political Code; and neither provides for notice of any kind or for an opportunity to be heard in any stage of the proceedings. It was, therefore, made without due process of law, as we understand the meaning of that provision as used in the Fourteenth Amendment in question.

Section 3664 of the Political Code, as adopted in 1880, requires the president, or some other designated officer of the class of corporations in question, to furnish the State Board of Equalization, on or before the first Monday of April in each year, a detailed statement of the whole number of miles of road operated, the number of cars, amount of rolling-stock, and their value, the gross earnings, and various other particulars; and requires the said Board, on or before the first Monday in May, to assess the franchise, roadway, roadbed, rails and rolling-stock. It is urged on the part of the plaintiff that this provision furnishes sufficient notice and opportunity to be heard to constitute due process of law on this point, within the meaning of the constitutional provision. In our judgment this position is clearly untenable. This is simply a mode adopted for obtaining information as to the amount and general value of the property of the corporation, as a basis, in part, at least, for their future consideration and action in making the assessment. It is but a preliminary step, and not the assessment, or any part of the assessment. The Board is under no obligation to adopt, either the statement as to what the property is, or its value. It may reject it altogether and adopt an entirely different basis. The party interested is entitled, at some point of the proceeding, to know what action the Board takes or proposes to take, and to an opportunity to be heard, as to its propriety, before the assessment becomes fixed and irrevocable. Other classes of property-holders, also, are required to file a statement of their property under oath; yet in the scheme provided for their assessment an opportunity to be afterwards heard is provided for.

The Constitutions of the State and Nation provide that private property shall not be "taken for public use without just compensation." When parties cannot agree there must be some mode provided for ascertaining the value of property so proposed to be taken for public use, under the sovereign right of eminent domain. Suppose a statute should provide a Board, or even a Court, to assess the value of property proposed to be taken under this power, for railroad purposes or other public use, and should give the owner of the property no notice or opportunity to be heard, other than to require him at sometime, say a month anterior to the consideration and determination of the amount to be paid, to furnish such Board or Court a similar statement as to the description and value of the property to that required by Section 3664, which the party might do or omit to do; would a subsequent *ex parte* determination of the value by the Board or Court be in pursuance of due process of law within the

meaning of the Constitution? I apprehend that no Court would sustain such a proceeding. I also think, that a taking for the purposes of taxation under such an assessment, without notice or opportunity to be heard, would be equally within the inhibitory provision relating to due process of law, and equally void.

The State Supreme Court has held the provision in the Constitution of California, authorizing the State Board of Equalization to assess finally the railroads of the class in question, to be self-executing, requiring no legislation of any kind to carry it into full effect; also, that the provision is mandatory. (*San Francisco and North Pacific R. R. Co.*, 8 Pacific Coast Law Journal, 1061.)

It is insisted by defendant that, this being so, it is incompetent for the Legislature to add to or take from the requirements found in the Constitution, and that the additional provision of Section 3664, as adopted in 1880, is void. The view already expressed upon the section renders it unnecessary now to determine that question, although presented by the record and argued by counsel. It would seem, however, that there can be no constitutional objection to legislating upon details for the purpose of more effectually carrying out the scheme of the Constitution, so far as the legislation is not inconsistent with any of its provisions. It is a general rule that a State Legislature has all legislative power not inhibited by the Constitution, State or National. (*Southern Pacific Railroad Co. vs. Orton*, 6 Saw. 186.)

This being so, it would seem that the Legislature might supplement the constitutional provision by statutory provisions, intended to more perfectly protect the rights of the parties by other safeguards, which are not inconsistent with the constitutional provision. But as this is a question more properly belonging to the State Courts, we do not deem it desirable to decide it now.

5. Is the provision of the State Constitution, under which the assessment in question was made, in conflict with the provision of the Fourteenth Amendment to the National Constitution which provides that no State "shall deny to any person the equal protection of the law?"

The Circuit Justice has discussed this question so fully and satisfactorily that I shall have little to add. The provision is: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so

levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of such security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

Whatever the property, then, real or personal, mortgaged to secure a debt, the value of the debt so secured, in the case of everybody *except* "a railroad and other quasi public corporation," is to be deducted from the value of the property mortgaged, and the value only of the property mortgaged, "less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." That is to say, that, whatever the nature of the property, it shall be taxed to the real owner. But in the case of "a railroad or other quasi public corporation," there is to be no reduction of the value of the mortgaged property, and the whole is to be taxed to one party, whether he in reality *owns* the whole or not. In one case, if property is mortgaged to the extent of half its value, the owner is taxed upon one-half the value, and the owner of the debt secured is taxed upon the other half. But in the other case, the owner of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one-half, upon none. A, a natural person, has fifty thousand dollars in cash—all the property he has—and purchases of B, another natural person, a piece of real estate for one hundred thousand dollars, that being its actual value, paying one-half down, and giving a mortgage for fifty thousand dollars to secure the balance of the purchase money. The Constitution in effect says—and in this instance such is the real actual state of facts—that A and B each has fifty thousand dollars in the property, one-half not having been paid for by A, and each shall be assessed and pay a tax upon his own interest in it, amounting to fifty thousand dollars. A, in this instance, is worth only fifty thousand dollars, and if he pays taxes upon a larger amount, he pays taxes upon property he does not really own—upon property owned by somebody else. This seems to be a self-evident proposition.

C, "a railroad, or other quasi public corporation," also has fifty thousand dollars cash, and purchases of B, for its proper use, an adjoining piece of real estate for one hundred thousand dollars, which is also its actual value, paying fifty thousand dollars, and giving a mortgage to secure the balance of the pur-

chase money. In this case, as in the other, the actual interest of each in the property is fifty thousand dollars. They stand precisely upon the same footing in all particulars with reference to the property. C has only fifty thousand dollars in the property—it not having paid for the other half—and B the rest. But in this case the Constitution says that C shall, nevertheless, be assessed for and pay taxes upon the whole property, double the amount he *really owns*, and B shall not be required to pay anything. That is to say, that C shall not only pay the tax on its own property, but the tax upon B's property; that money, to the amount of the tax assessed upon fifty thousand dollars belonging to B, shall be taken by the State or county from C, and appropriated to the use and for the benefit of B, to liquidate B's share of the public burdens. This sum, being so much more than C's share of the public burdens, and being in fact B's share, the result of the operation is, not only to take so much property from C, for public use, without compensation, but also to arbitrarily take it from C and apply it to the use and benefit of another private party, B, without compensation. The result would be the same, whether the property of A, B and C, thus situated and mortgaged, is land, a railroad operated in one or more counties, or any other kind of property. Does a law which authorizes such proceedings—such discriminations—bear or press equally upon A and C, or equally upon B and C? Is C equally protected in its rights of property with A, or equally protected with B? Although situated precisely alike with reference to their property, do they feel the pressure of the public burdens equally and alike. The question does not appear to me to admit of argument. Upon the very statement of the proposition, it seems to me to be self-evident that a law authorizing and *requiring* such proceedings, does not afford, but expressly *denies* the equal protection of the law. The Constitution in the one case says that “the mortgage, deed of trust, contract, or obligation” shall be “deemed and treated as an interest in the land affected thereby,” which, in the cases supposed, together with the debt secured, it undoubtedly, in fact, is; but in effect the Constitution says it is not so in the other case. Different kinds of property may require to be taxed in different forms and modes, in order to be equally taxed. And classifications of property, for purposes of taxation, should have reference to the just equality of burdens, so far as that is practically attainable. Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property. If the arbitrary discrimination and classification found in this case can be legally made un-

der the Constitution, and the law of the land, then the Constitution, or the law, can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or condition of the property. A person may, by statutory provisions, be classified and defined out of the equal protection of the law, guaranteed by the Constitution; and if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guaranties of the Constitution, State or National. I am not arguing that property of all kinds may not be taxed where it is found; but in this case there is a personal liability sought to be enforced against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement such as are applicable to others similarly situated, by the party who ought to pay the tax.

What constitutes the equal protection of the law is well stated in *Ah Kow vs. Nunan*, 5 Saw. 562; *In re Ah Fong*, 3 Saw. 144; *Pearson vs. Portland*, 69 Me. 278; *Portland vs. Bangor*, 65 Maine, 120; *Missouri vs. Lewis*, 101 U. S. 22. See, also, *Live Stock, &c., vs. Crescent City Co.*, 1 Abb. 398; *Parrott's Chinese Case*, 6 Saw. 377. That inequality and different principles of taxation of persons similarly situated, as in this case, are violations of this provision seems to be already determined by the Supreme Court of the United States. The Civil Rights Act, as re-enacted in 1870, and, again, in the revised statutes, provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (16 Stat. 144, Sec. 16; R. S. 1977.)

The Congress which passed this Act embraced many of the members who were in the Congress which framed and proposed the Fourteenth Amendment; and they may be supposed to be well informed as to the purpose and scope of that amendment. This Act was passed in pursuance of the last clause of the amendment, as a part of the appropriate legislation to enforce its provisions. It is, therefore, a legislative construction, as to the scope of the provision inhibiting the States from denying to any person the equal protection of the law. The United States Supreme Court gives the amendment a similar construction as to its scope. In *Sirauder vs. West Virginia*, the Court says that Sections 1977 and 1978 of the revised statutes "partially enumerate the rights and immunities intended to be granted by the Constitution."

and after quoting Section 1977, as above set out, adds: "This Act puts in the form of a statute what had been substantially ordained in the constitutional amendment. It was a step toward enforcing the constitutional provision." (100 U. S. 311.)

In *Ex parte Virginia*, the Court, referring to *Tennessee vs. Davis and Strauder vs. West Virginia*, said: "We held that the Fourteenth Amendment secures, among other civil rights to colored men, when charged with criminal offenses against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the *equal rights* of all persons, and that any withholding it by a State is a *denial of the equal protection of the laws within the meaning of the amendment*. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the General Government and guaranteed by it. We held, further, that this protection and this guaranty, as the fifth section of the amendment expressly ordains, *may be enforced by Congress by means of appropriate legislation*." (100 U. S. 345.)

If discrimination in fixing the qualifications of jurors inferentially violates the provisions of the Fourteenth Amendment, as denying the equal protection of the law, it is not easy to perceive why discriminations in the assessment and collection of taxes expressly made are not equally so.

Thus it appears that the Supreme Court regards the section quoted as within the scope of the Fourteenth Amendment, and the Act provides that every person "shall be subject to like . . . taxes, licenses, and exactions of every kind, and to no other, as 'white citizens,'" and this is held to be appropriate legislation to enforce the amendment. We have already seen that this defendant is subjected to taxes and exactions other than, and different from those imposed upon "white citizens." We have already held that the word "person," as to property rights, as used in the amendment in question, includes a corporation, and as used in the provision of the statute cited, it includes a corporation by express definition of the statute itself, which says, in terms: "In determining the meaning of the revised statutes . . . the word 'person' may extend and be applied to partnerships and corporations." (Page 1, Tit. I., Chap. One, Sec. 1.)

The provision of the Constitution of the State of California in question, therefore, violates the provision of the Fourteenth Amendment in denying to defendant the equal protection of the law.

"An unconstitutional law is void, and is no law." (*Ex parte Lebold*, 100 U. S. 376.)

"The Constitution and laws of the United States are the supreme law of the land, and to those every citizen of the United States owes obedience, whether in his individual or official ca-

capacity.The laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." (Ib., 392 and 397.)

6. It is further urged on the part of plaintiff, that under the State Constitution, the Legislature is authorized to alter or repeal the laws under which corporations are formed—they cannot be properly called charters—and that this mode of taxing corporations, in effect, operates as an amendment of the Act authorizing the formation of corporations; and that corporations hold their franchises in subordination to that provision.

The proceeding in question is either taxation or something else; either an exercise of the sovereign right of taxation, or the exercise of some other power; either taxation or not taxation. The provision, in express terms, purports on its face to provide for taxation. The convention that framed the article, and the people when they adopted it, evidently must have supposed they were providing a scheme of taxation. The provision admits of no other construction.

The provision is found in the chapter entitled "Revenue and Taxation," and the section says "for the purpose of *assessment and taxation*," etc. If the proceeding is taxation, then it provides and can only provide for taking from the defendant an amount of money equal to its just share of the public burden to be discharged by the taxation, and nothing more. Anything beyond that is taking private property for public use without compensation. If the proceeding is taxation, there is no necessity for resorting to any other provision of the Constitution. If it is not taxation—if the amount demanded, or the principle adopted, is imposed as a condition of continued existence, or as a limitation of its rights to exercise its franchise, then it is an annual *bonus* demanded for the franchise, or the privilege of existence, such as was formerly often demanded and paid by corporations for the special privileges given by special charters, when there were no restrictions upon the legislative power upon the subject, and is not taxation. If it is a *bonus* demanded and paid for this right, then, *in addition*, the corporation is subject to taxation upon its property, for under the Constitution all property must be taxed. "All property in the State," says the Constitution, "not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." (Article XIII., Sec. 1.) And Section 6 of the same Article says that "The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party." If, therefore, the provision of Section 4, relative to "railroad or other quasi public corporations," is a *term or condition of the contract* upon which its existence and further exercise of its franchises depend, then it must still be liable to taxation on its property in the proper mode. By a contract authorizing certain persons to form a corporation and exercise its franchises, however

valuable the consideration received, the State cannot, as we have seen, surrender or suspend its rights to tax its property besides, as all other property is taxed. Other taxpayers are entitled to have the property of the corporations properly taxed. Again, if the submission to this mode of what is called taxation becomes a *valid* condition of the continuance of the further existence of the corporation and the further exercise of its franchises, then a refusal to pay the tax is a violation of the conditions of its being, and the Courts, upon a proceeding for the purpose by the State, in the nature of a *quo warranto*, would probably adjudge the forfeiture of its charter and wind up its affairs. This would be the appropriate remedy. I apprehend that no Court would so adjudge under the present Constitution on that ground. It is clear to me, therefore, from these considerations and the express terms themselves of the Constitution that the provision in question attempts to provide only for exercising the sovereign power of taxation—has no other end to accomplish, and accomplishes no other purpose; and that the rights of the parties must be determined on that hypothesis alone.

Again, the general Act authorizing the formation of corporations confers upon those complying with its provisions certain rights, franchises and privileges. It endows the parties as organized with certain faculties and capacities, the result being to give them in their united character, under a certain name, a capacity to do business and acquire property. A law merely authorizing the formation of a corporation gives the corporation formed no property. That must be acquired by the corporation for itself. The Legislature, under the various guaranties of the Constitution, State and National, can only take away, limit, enlarge or modify that which it gave. And what is given in the creative Act is simply its capacities; its legal faculties, including all such as are essential to its corporate existence; all those powers which are strictly corporate, being those powers which can only be given by legislative act; powers not possessed by natural persons or partnerships, acting in their natural, individual, or associate characters, independent of legislation. These strict corporate powers I attempted to define in *Orton's case* (6 Saw. 187). The powers thus given, essential or otherwise, and their future exercise, may be modified or otherwise affected by subsequent legislation. A corporation having been formed with capacity to acquire and hold property, the Legislature may, doubtless, grant to it, as well as to natural persons capable of taking, property rights; but such rights of property, when once vested, can no more be withdrawn than the property acquired from other sources, or than property granted to or acquired by natural persons. The property acquired in the exercise of its corporate faculties, from whatever source derived, is the property of the metaphysical being called the corporation, held, however, in trust for the sole benefit of the corporators. As such, it is

protected like all other property, and can only be taken by the law of the land, in some one of the modes not inhibited by the Constitution. It cannot, in my judgment, be taken even as a further condition of corporate existence without the assent of the corporation or its corporators. There is no consent in this case to submit to any such conditions, and that is not the basis upon which the action is brought. There is no promise to pay a bonus set out in the complaint upon which an action can be maintained. I apprehend that a mere provision in the form of a statute or a State Constitution adopted after the formation of a corporation, that corporations under the law should cease to exist unless they surrender to the State all the property theretofore acquired by the corporation, would be void. And power to demand a part, as a condition of existence, however small, is power to demand all. Such a statutory demand would be but a flimsy guise or pretext for evading all the guaranties of the Constitution, which would not for a moment be tolerated. It would be to seek indirectly what could not be attained directly, the accomplishment of an unlawful end by what, at best, is but apparently lawful means. (See on this point Parrott's Chinese case, 6 Saw. 349; opinion of Hoffman, J.) In that case I had occasion to say: "The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful and equally in violation of the Constitution and treaty stipulations to use any means, however proper, or within the power of the State for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. (*Brown vs. Maryland*, 12 Wheat. 419; *Ward vs. Maryland*, 12 Wall. 431; *Woodruff vs. Parham*, 8 Id. 130-140; *Hinson vs. Lott*, Id. 152; *Welton vs. Missouri*, 91 U. S. 279-282; *Cook vs. Pennsylvania*, 97 Id. 573.)"

The observations of Mr. Justice Field, in *Cummings vs. Missouri* (4 Wall. 325), are pertinent in this connection. He said: "The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (See, also, *Henderson vs.*

Mayor of N. Y., 92 U. S. 268; *Chy Lung vs. Freeman*, Ib. 279; *Railroad Co. vs. Huson*, 95 Ib., p. 472.)

The foregoing observations apply equally well to any effort to obtain the property of corporations by irregular means not applicable to natural persons. It seems to me that under our general system embodied in the Constitution providing for corporations, which forbids the granting of any special privileges not enjoyed by all other persons, it was intended to put corporations, with respect to their property and to all other matters, except what is in fact granted by the laws, in all particulars upon the same footing as natural persons.

In my judgment the State constitutional provisions under consideration, and the laws passed to carry them out, violate the provision of the Fourteenth Amendment, in question, in two vital particulars:

1. They assess railroad and other *quasi* public corporations upon a different basis from that adopted with respect to natural persons, similarly situated, in the particulars herein pointed out.

2. They provide, with respect to natural persons, notice and an opportunity to be heard in the course of the proceeding to assess their property before the assessment becomes fixed, while they afford no such notice, or opportunity to be heard, to railroad and other *quasi* public corporations; and in both these particulars deny to the latter the equal protection of the law within the meaning of the Fourteenth Amendment to the National Constitution.

Again, this suit is for a tax and nothing else. It proceeds upon that idea, and the idea alone, that a valid tax has been assessed against the defendant, which this action is brought under the statute to recover. The suit cannot be maintained upon a liability imposed under other and different provisions of the Constitution. If it cannot be maintained as for a tax, it must fail. The recovery, if any is had, must be upon the cause of action alleged.

We do not conceive that a provision for assessing railroads operated in more than one county, by the State Board of Equalization, while other local property is assessed by the local assessors, would be denying the equal protection of the law, provided the assessment in the former case is, in all respects, made upon the same basis, under the same rules, and upon the same principles, as to value, notice, opportunity to be heard, etc., as in the latter. The presumption would be that all the officers would perform their duties justly under the law; and that the assessments so made upon property, differently circumstanced, would operate equally. Nor do we think that the assessment of the "franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county in the State," "by the State Board of Equalization," as a unit, and apportioning the amount of the assessed value to the several counties, etc., in proportion

to the number of miles in each, is objectionable, on the ground that it denies the equal protection of the law to the owner of the road.

Indeed, this seems to be the only practicable way of assessing such a road. It is owned and operated as a unit, and cannot be otherwise usefully employed. Its income, expenses, management, and all its operations are as a unit. Its rolling-stock is at one point at one moment, and at another at a different point of time, but it is all working together as a unit to the accomplishment of one end. In fragments and isolated parts, the road would be comparatively valueless as property. It is only as a unit that it can be properly considered or properly taxed. To tax it otherwise would be to tax it upon principles materially different from those applicable to other property, necessarily considered and used as an unit. The character and circumstances of the property are such as seem to justify a classification for this purpose. These points, also, seem to be determined in favor of the plaintiff in the State Railroad Tax Cases, 92 U. S. 575. The other points, determined in this case, are not involved in those cases.

Whatever public inconvenience may temporarily result from our decision—and it must necessarily be great—satisfied, as we are, that the provisions of the State Constitution now in question violate the inhibitions of the Fourteenth Amendment, our duty is plain; and we cannot, if we would, shrink from its performance. There must be judgment for the defendant.

Since the argument in these cases commenced, apparently in anticipation of what must necessarily be the result, various means, more or less violent, have been suggested, through the public press and elsewhere, to prevent railroad corporations from escaping the payment of their just share of the public burdens, such as taking away their franchises, seizing and appropriating their property first and litigating the right afterwards, and punishing by the severest penalties the officers of all such corporations, in all cases where resistance to payment of a tax is made in the Courts, however illegal the exaction or whatever the ground of complaint on their part may be. Violent counsels of this character usually result in constitutional and statutory provisions such as those we are considering and now hold void, which render it necessary to seek the protection of our national *Magna Charta*. It would be idle—utterly futile—to insert a provision in the National Constitution guaranteeing to every person within its jurisdiction his life, his liberty, and his property, if certain classes can be selected out in the subordinate legislation of the country to be visited with condign punishment, if they even seek to invoke the protection of this beneficent guaranty against discriminating and wrongful legislation. If a single individual can be deprived of the protection of this provision by

such means, so can all. If such things can be, wherein does the protection of the guaranty consist?

A far wiser and more statesmanlike proceeding would seem to be to avoid all occasion for resistance to wrong in the guise of void laws, by coolly and calmly re-examining the subject in the light of past experience, and so amending our State Constitution and statutes as to bring them into entire harmony with all the guaranties of the Fourteenth Amendment, "the crowning glory of our National Constitution"—that noblest and best Constitution ever devised by the wisdom of man.

If the life, liberty, property and happiness of all the people are to be preserved, then it is of the utmost importance to every man, woman and child of this broad land, that every guaranty of our National Constitution, whatever temporary inconvenience may be felt, be firmly and rigorously maintained at all times and under all circumstances. In the language of the Supreme Court of the United States: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." (Milligan's Case, 4 Wall. 120.)

For the reasons stated, as well as those advanced by the Circuit Justice, I concur in the judgment ordered.

ORDER STAYING PROCEEDINGS.

As the questions we have considered are of the greatest importance, and their correct solution concerns not merely the railroad corporation which is the defendant, but corporations of every kind, other than municipal, we shall order a stay in all other cases (not decided to-day) now pending in this Court, involving the same questions, until this case can be brought before the Supreme Court of the United States, and the questions involved shall have received by its judgment their final and authoritative determination. If the decision now reached be there sustained, the State will be obliged to order a new assessment, in making which the defendant will be allowed a deduction in the valuation of its property for the mortgage thereon, and also a hearing before the State Board of Equalization with respect to the assessment. If, on the other hand, the decision be reversed, the other cases can be at once disposed of. By taking out a writ of error immediately on the judgment now rendered, it is possible that the case may be advanced on the calendar and be heard at the coming term.

New Law Publications.

SUTHERLAND ON DAMAGES. A Treatise on the Law of Damages, embracing an Elementary Exposition of the Law, and also Its Application to Particular Subjects of Contract and Tort. By Hon. J. G. Sutherland. 3 vols.; 8vo.; \$18.

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As may be seen by the table of contents, the plan of treatment is substantially the same as that followed in "Greenleaf on Evidence."

Volume I is devoted to a statement of the general principles of the law of damages, together with the pleading and procedure, and is itself a complete treatise.

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Published by Callaghan & Co., Chicago.

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This work is well advertised in the name of its chief author, Seymour D. Thompson. The subject is an important one, and there has been a need of a thorough text-book thereon. This book shows throughout the accurate, thorough and scholarly work of its authors.

Abstracts of Recent Decisions.

DIVORCE—EXTREME CRUELTY OF WIFE.—It is extreme cruelty, warranting a divorce, for a wife to causelessly humiliate and disgrace her husband and endanger his means of subsistence by habitually, persistently and publicly accusing him of infamous conduct in violation of his marriage obligations, and by applying vile and vulgar epithets to him and dogging him, and setting others to spy out his movements, until by inordinate and indecent exhibitions of jealousy and the criminal indulgence of unworthy suspicions and ungoverned violence she has practically destroyed the decencies and the purposes of the marriage relation. (*Whitmore vs. Whitmore*, S. C. Mich., October 31, 1882; 13 N. W. R. 800.)

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Current Topics.

SIC UTERE TUO UT ALIENUM NON LAEDAS.

This is a very old legal maxim, easy to understand, but often difficult to apply. Its application is especially a matter of perplexity when the "tuo" is real property.

When a person uses his own property in such manner as to injure another in his property, comfort, or convenience, a jury is authorized to find that he is guilty of a nuisance. (*Moak's Underhill on Torts*, 229; 61 N. Y. 182, 4.)

Every owner of real property is responsible for every nuisance thereon. When it is sought to make one accountable for the consequences of acts done by him upon his own land, the question in general is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been performed. (*Moak's Underhill on Torts*, 354.)

There is a natural servitude imposed upon every owner of land to afford lateral support to the adjacent land of his neighbor, in its natural state, and the withdrawal of such support is a nuisance. (*Moak's Underhill on Torts*, 410.)

Where a person is in possession of fixed property, which is so managed or dealt with that injury results to another, the former will not escape liability by reason of the fact that he has employed an eminent and competent contractor. (*Ewell's Evans on Agency*, page 500.)

A principal cannot by any contract relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance. (61 N. Y.

188; *Coolie on Torts*, 547; *Thompson on Neg.* 890, 903, 907, 908; 3 *Gray*, 357, 359, 362; 8 *Ohio St.* 358; 4 *Ohio St.* 41.)

In *Bush vs. Steinman* (1 B. & P. 404) this doctrine was carried so far that the owner of realty was responsible for any act done in connection therewith, though done by an independent contractor.

The doctrine of *Bush vs. Steinman* has long since been repudiated, but not entirely. The owner of realty is liable for any injury resulting to another for any act done upon the land that amounts to a nuisance. (2 *Bl. Com.* B. 3, ch. 13, p. 218; 3 *Gray*, 359; 18 *Minn.* 336.)

From the foregoing authorities, the liability is because of the act done amounting to a nuisance. The rigor of this doctrine was particularly felt in regard to the right of an owner of land to the lateral support furnished by the adjoining land, and, accordingly, statutes have been enacted allowing a coterminous owner to make proper and usual excavations for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other. (*Civil Code of Cal.*, Section 832.)

If, however, the owner of realty puts his land to a use which naturally or necessarily tends to injure the land or property of another, he is not protected by the statute. (18 *Minn.* 337, 338, 342, 348; 10 *Ire.* (N. C.) 562; 40 *Md.* 15; 7 *N. Y.* 497; 61 *N. Y.* 185; 2 *Black*, 418; 4 *Abb.* N. C. 292; *Thompson on Neg.* 865, 899-903; *Moak's Underhill on Torts*, 42.)

Apart, however, from the technical view of the act being a nuisance, the owner of realty may incur a liability on account of the use to which he puts his land, by reason of some legal duty incumbent on him by reason of his ownership. This especially applies to any interference with highways by the owners of property abutting thereon. (*Moak's Underhill on Torts*, 41; 36 *Wis.* 29; *Sherm. & Redf. on Neg.* 111; 2 *Black*, 418; 9 *Heisk. Tenn.* 1.)

DISCRIMINATIVE TARIFF RATES.

Adelbert Hamilton, in the *American Law Review* for November, has contributed a very interesting article upon this subject. His thorough review of the authorities makes the article a valuable one just at this time.

Supreme Court of California.

In Bank.

[Filed November 17, 1882.]

No. 10,761.

PEOPLE, RESPONDENT, vs. HOIN, APPELLANT.

CRIME—INSANITY—INSTRUCTIONS—IRRESISTIBLE IMPULSE. Defendant was accused of murder. The Court charged the jury: "As a defense to this prosecution the defendant has interposed the plea of insanity. * * * 'Insanity' as used in this sense means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged." *Held*, the instruction was proper; it is substantially the law as laid down by Tindal, C. J., in the answers of the English Judges to the questions propounded to them by the House of Lords, after the acquittal of McNaughton.

Id.—Id. "The circumstance of the prisoner having acted under an irresistible influence to the commission of homicide no defense, if at the time he committed the act he knew he was doing what was wrong."

Id.—Id. "The English Courts have refused to recognize the co-existence of an impulse *absolutely* irresistible with capacity to distinguish between right and wrong with reference to the act. It cannot be said to be irresistible because not resisted. Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which yet leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease. No different rule has been adopted by American Courts.

Appeal from Superior Court of San Francisco.

C. B. Darwin, for appellant.

Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The Court below charged the jury: "As a defense to this prosecution the defendant has interposed the plea of insanity. * * * 'Insanity,' as used in this sense, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged."

The charge as given is substantially the law as laid down by Tindal, C. J., in the answers of the English Judges to the questions propounded to them by the House of Lords, after the acquittal of McNaughton: "The jury ought to be told * * * that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of com-

mitting the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to *the very act* with which he is charged."

Counsel for defendant asked the Court below to charge: "The mere intellectual knowledge of right and wrong is not enough to defeat a defense of insanity, unless with such knowledge the defendant also has the volitional power to choose the one instead of the other. No thoroughness of knowledge by the defendant that the act of killing the deceased then and there was wrong and forbidden, would defeat his defense of insanity, if it were also legally proved that, while he possessed such knowledge, he did not possess the power to do or not to do the killing under the guidance of such knowledge."

It is evident from the case as presented, that the instructions requested refer to an entire absence of power of choice which, it is assumed, may exist with a capacity to distinguish between right and wrong as applied to the particular act. There is no evidence tending to prove the existence of such physical disease as, of itself and separate from its effect upon the mind, would deprive one of the control of his action, as in the case of the "convulsive fit" spoken of by Sir James Fitz Stephens. (Digest of Criminal Law, Note 1, p. 361.) Such irresistible impulse to commit an act which he knows is wrong or unlawful (if it ever exists), does not constitute the insanity which is a legal defense.

How can such impulse be known to exist? Rolfe, B., in summing up in *Reg. vs. Stokes*, 3 C. and K. 185, said: "It is true learned speculators, in their writings, laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart and see the real motive that prompted the commission of such deeds?" And the learned Baron charged the jury: "Every man is held responsible for his acts by the law of this country, if he can discern right from wrong." And in *Reg. vs. Hayes*, 1 F. and F. p. 666, Branwell, B., said: "It has been

urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, the circumstance of an act being *apparently* motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, the restraint of law. But if the influence itself be held to be a legal excuse, rendering the crime dispensable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must, therefore, return to the simple question you have to determine, did the prisoner know the nature of the act he was doing, and did he know he was doing what was wrong? The reporter's head-note to this case contains the statement: "The circumstance of the prisoner having acted under an irresistible influence to the commission of homicide no defense, if, at the time he committed the act, he knew he was doing what was wrong."

In *Reg. vs. Barton*, 3 Cox, C. C. 275, Baron Parke told the jury "that there was but one question for their consideration, viz, whether, at the time the prisoner inflicted the wounds which caused the death of his wife he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defense of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with Mr. Baron Rolfe's views of such cases, that learned Judge having expressed his opinion to be that the excuse of an irresistible impulse, co-existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law, for every man might be said, and truly, not to commit any crime—except under the influence of some irresistible impulse. Something more than this

was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of the knowledge that he was doing wrong."

It will be seen that the English Courts have refused to recognize the co-existence of an impulse *absolutely* irresistible with capacity to distinguish between right and wrong with reference to the act. It cannot be said to be irresistible because not resisted. Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which yet leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease. No different rule has been adopted by American Courts.

Judgment and order affirmed.

We concur: Ross, J., Sharpstein, J., Myrick, J., Morrison, C. J., McKee, J.

DEPARTMENT No. 2.

[Filed November 17, 1882.]

No. 8511.

LAWRENCE, APPELLANT,

vs.

COYNE, SHERIFF, ETC., RESPONDENT.

DESCRIPTION—SHERIFF—PLEADING—ACTION—PROCESS—JURISDICTION. Insufficiency of description of property in a complaint for its recovery or value furnishes no cause of action against a Sheriff who had seized such property under process regular upon its face, issued by a Court having jurisdiction.

Appeal from Superior Court, San Diego County.

Gatewood and *Hotchkiss*, for appellant.

Leach and *Parker*, for respondent.

By the COURT:

Plaintiff sued defendant as the Sheriff of San Diego County, for the possession of certain sheep or the value thereof, and defendant justified under a seizure made by him in an action brought against the plaintiff and others by one Joseph Lamb-eye. There is but one point made on the appeal and that is that

the complaint filed in the case of Lambeye against Lawrence and others did not contain a sufficient description of the property. If the point were well taken it would not follow therefrom that the plaintiff has any cause of action against the defendant. The Court had jurisdiction. The process was regular on its face, and justified the defendant in seizing the property.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 10,786.

PEOPLE RESPONDENT, vs. DOGETT, APPELLANT.

HOMICIDE—CHARACTER—EVIDENCE—INSTRUCTION. The Court erroneously refused the following instruction in this case: "The law at the outset clothes the defendant in a criminal case involving the charge of murder, with the presumption of innocence, and when the proof tends to overthrow this presumption, and to fix upon such defendant the perpetration of such a crime, the latter is permitted to support the original presumption of innocence by proof of good character for peace and quietness; and the good character of the defendant for peace and quietness is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence. And therefore in the present case, the good character of the defendant, if proved to your satisfaction, is to be considered by you in connection with the other facts and circumstances of this case in determining the guilt or innocence of the defendant."

Id.—Id. The general charge of the Court did not cover the same point. Defendant had the right to have the jury instructed, that in determining whether or not he was guilty beyond a reasonable doubt, his good reputation as to traits involved in the charge, if proved, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to his guilt.

Appeal from Superior Court, San Francisco.

Louderback, Shafter, and Parker, for appellant.
Attorney-General Hart, for respondent.

Ross, J., delivered the opinion of the Court:

The Court below refused to give the following instruction requested by the defendant:

"The law at the outset clothes the defendant in a criminal case involving the charge of murder, with the presumption of innocence; and when the proof tends to overthrow this presumption, and to fix upon such defendant the presumption of such a crime, the latter is permitted to support the

original presumption of innocence by proof of good character for peace and quietness; and the good character of the defendant for peace and quietness is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence. And therefore in the present case, the good character of the defendant, if proved to your satisfaction, is to be considered by you in connection with the other facts and circumstances of this case in determining the guilt or innocence of the defendant." It is conceded by the Attorney-General that the instruction so requested correctly states the law, and that unless the general charge of the Court covers the same point, the case must be sent back for a new trial.

The Attorney-General, however, claims that the effect of the instruction requested and refused, was embodied in the following portion of the Court's charge: "I think I have neglected to charge the jury in regard to character under the decisions of our Supreme Court. And those decisions are the law of this State and of this case, good character, when proved, is a fact to be considered by the jury, just the same as any other fact in the case is to be considered as bearing upon the question of the guilt or innocence of the accused. It has been held before, and is now held in other tribunals, that good character was only applicable in doubtful cases to turn the scale when the jury was in doubt from the other evidence as to whether a defendant was guilty or not. And our Supreme Court has said that it goes in with the mass of all the other proof, to be considered by the jury in connection with all the evidence in the case, as a substantive fact bearing or tending to bear upon the question of guilt or innocence."

Omitting some comments that might justly be made on this part of the charge, it is safe to say that it would be a favorable construction of it to hold that by it the Court told the jury that the good character of the defendant, if proved, was a circumstance in the case for their consideration in making up their verdict. But that, as was held in *People vs. Bell*, 49 Cal. 489, would not be adding anything to the mere fact of letting the testimony in regard to good character in.

The defendant had the right to have the jury instructed, that in determining whether or not he was guilty beyond a reasonable doubt, his good reputation as to traits involved in the charge, if proved, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to his guilt. (*People vs. Bell, supra; People vs. Raina*, 45 Cal. 292; *People vs. Ashe*, 44 Id. 291.)

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 8640.

THE SANTA CRUZ GAP TURNPIKE JOINT STOCK
COMPANY, PETITIONER,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY
OF SANTA CLARA, RESPONDENT.

MANDATE — SUPREME COURT — FORMER ADJUDICATION — SUPERIOR COURT —
RULE. To an application for a writ of mandate from the Supreme Court, respondent pleaded a former adjudication of the matters by the Superior Court. *Held:* It may be that this Court would consider as a "circumstance" under Rule 28 of the Court, which would induce it to issue a prerogative writ, the fact that the Superior Court had refused to take jurisdiction of, or to consider the application upon the merits. But when, upon issue of law of fact joined, a Superior Court has adjudicated the merits of the application, such adjudication is as conclusive (except on appeal) upon this Court as it is upon another Superior Court.

Id.—Id.—APPEAL. *Semble*, an appeal will lie in such cases from the judgment of the Superior Court. (*Winter vs. Fitzpatrick*, 35 Cal. 269.) If an appeal lies plaintiff has "a plain, speedy, and adequate remedy in the ordinary course of law." (C. C. P. 1036.) If an appeal does not lie from the judgment of the Superior Court, the answer of defendant is a plea of a former adjudication, between the same parties, in a Court of competent jurisdiction.

Mandate.

S. O. Houghton, for petitioner.

S. F. Lieb, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Rule 28 of this Court provides: "In any application made to the Court for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other Court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that

the writ should issue originally from this Court, and not from such other Court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the Court in awarding or refusing the application. In case any Court, Judge, or other officer, or any Board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and, in such case, it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to procure and file in the office of the Clerk of this Court the like evidence of such service.”

It may be that this Court would consider as a “circumstance” which would induce it to issue a prerogative writ, the fact that the Superior Court had refused to take jurisdiction of, or to consider; the application upon the merits. But when, upon issue of law, or fact joined, a Superior Court has adjudicated the merit of the application, such adjudication is as conclusive (except on appeal) upon this Court as it is upon another Superior Court. In issuing writs of mandamus, certiorari, and prohibition, the Supreme Court and the several Superior Courts are peers. Both the Supreme Court and the Superior Court has original jurisdiction. (Cons. Art. VI, Sections 4 and 5.) Whether the judgment of each is final—in view of the language of the sections referred to—it is not here necessary to decide. *Seem*, an appeal will lie in such cases from the judgment of the Superior Court. (*Winter vs. Fitzpatrick*, 35 Cal. 269.)

The defendant in the proceeding now here pleads that “heretofore and before the commencement of this proceeding the plaintiff commenced the same proceedings for the same purpose in the Superior Court of the county of Santa Clara, and on the eighteenth day of October, A. D. 1882, said proceedings in said Superior Court resulted in a judgment of said Superior Court, by it then duly given and made, that plaintiff was not entitled to such relief, and that the application therefor be denied, a true and correct certified copy of which proceeding and judgment in said Superior Court are hereto annexed marked ‘Exhibit A.’” The exhibit is made a part of the answer herein, and contains a copy of

the complaint or petition in the Superior Court. It is not disputed that such complaint or petition is in all respects like the complaint filed in the present proceeding. The "exhibit" further shows that the defendant in the Superior Court (defendant here,) by motion, in the nature of demurrer, moved the said Superior Court to vacate the writ upon the ground that the complaint or petition did not state facts upon which the same should issue; further, that the motion or demurrer having been sustained by the Superior Court, with leave to amend the complaint or petition, plaintiff, in open Court, refused to amend, and thereupon a final judgment was entered by the Superior Court that the writ be denied, and in favor of defendants for their costs, etc.

If an appeal lies from the judgment of the Superior Court, the plaintiff has "a plain, speedy, and adequate remedy in the ordinary course of law." (C. C. P. 1036.) If an appeal does not lie from the judgment of the Superior Court, the answer of defendant is a plea of a former adjudication, between the same parties, in a Court of competent jurisdiction.

The cause will be set down for trial upon the issue of fact raised by the answer. The fact will be determined by inspection of the record, but, as yet, the existence has been alleged, not proved.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed November 17, 1882.]

No. 7460.

HAM ET AL., RESPONDENTS,

VS.

SANTA ROSA BANK, APPELLANT.

HOMESTEAD—VALUE—DECLARATION—ESTIMATE. A declaration of homestead was filed in which the value of the homestead premises was estimated at \$8,000. *Held*, the declaration was not invalid because the estimate of value was in excess of the value of the homestead premises exempted by law from forced sale.

Appeal from Superior Court, Sonoma County.

A. Thomas, for appellant.

McGee and Johnson & Henley, for respondents.

By the COURT:

As head of a family, the defendant, Jouillard, filed a declaration of homestead in which he estimated the value of the homestead premises at \$8,000; and the contention here is, that this estimate of value, being in excess of the value of the homestead premises exempted by law from forced sale, renders his declaration ineffectual to vest in the family a homestead right.

A homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as provided by law. (Sec. 1237, C. C.; *Gregg vs. Bostwick*, 33 Cal. 220; *Estate of Delaney*, 37 Cal. 176.) It is selected according to law whenever the claimant executes and acknowledges, as a grant of real estate is required by law to be acknowledged, and files for record a declaration containing a statement showing (1) that the person making it is the head of a family; (2) that he is residing on the premises and claims them as a homestead; (3) a description of the premises; and (4) an estimate of their cash value. From and after the filing for record of such a "declaration" the premises described in it become the homestead of the claimant, and the record of the declaration operates as notice of the selection to all the world. (Title V, Chap. II, C. C.)

In the selection of a homestead there is no statutory limitations as to quantity or value. The law simply requires that the premises selected for that purpose shall be described, and that the value of the premises shall be estimated.

It is just to infer that this requirement was of a true estimate, not a false one. It was not required to be under oath; therefore, by making a false statement of the value, a homestead claimant does not incur the pains and penalties of perjury. So far as legal penalties are concerned, he is left free to insert a false estimate in his declaration; but, if he prefers to state what is true on the subject, the truth of his statement should not be used against him to destroy a right, if it be founded upon a compliance with the requirements of law.

Now, the estimate of the claimant in the declaration under consideration, together with the description of the premises and the statement that he was the head of a family, and was residing on the premises which he claimed as his homestead, constituted the essential elements of the declaration required by the homestead law to indicate his selection. The declaration itself was made strictly according to the formalities prescribed. In every particular the provisions of Sections 1262, 1263, Chapter II, of the Homestead Law,

were complied with. Having been strictly complied with, how can it be held that a declaration made according to the forms of law, is void under the law? Certainly there are no words in the sections referred to which make the legal acts of a homestead claimant issue in such a result. If there were, the provisions of those sections would be involved in absurdity—a thing which the legislator could not have intended.

It is claimed, however, that such a result arises out of Section 1290, Chap. I, of the law by which it is declared that "Homesteads may be selected and claimed: 1, of not exceeding five thousand dollars in value by any head of a family." If this is to be regarded as such implication it would prove too much. It would prove that the right could not attach under the statute, if the place declared on was of more than five thousand dollars in value, whatever might be stated as the estimate of value of the parcel described in the declaration. Certainly the statute meant nothing of this kind. Again, such implication cannot exist, for the reason that the word "value" is used in Section 1260, and the language in Section 1263 is "estimate of value." The right of exemption is made to depend on the actual value, not on the declarant's estimate of value; on an actual existing reality, not on the fallible or mistaken opinion of the declarant of what that real value may be. In Section 1260 the law speaks of something certain; in Section 1263 of something existing in the mind of a person, of which certainty cannot assuredly be predicated; for nothing is more uncertain or more variable than an estimate of value.

The Section (1260) ought not to be held to change the meaning of Section 1263, if the provisions of the two sections can be harmonized. These provisions can be brought into harmony so as to exclude any prohibitory effect in the latter section over the former by the fact that they refer to different things, one to value in the opinion of the other persons, and the other to an estimate of value in the opinion of the declarant. If one portion of a statute is held to affect and change another, there must be a conflict in the controlling clause over that which it controls. And if there is no conflict here, no alteration can be allowed in one by the other. If there is a conflict and one changes the other section, why not as well hold that Section 1263 changes the meaning of Section 1260? If it is so held, the prohibition by implication ceases to exist. Besides, the question is pertinent here, who made Section 1260 the master of 1263? Who invested the former with dominion over the latter? They emanate

from a common source of power, and that common source has not invested the former section with any such control. But this common parent has furnished the means of controlling this strife, for where there is a conflict between the two sections the difficulty must be solved by the canon prescribed in the Political Code, *for the construction of all Codes*.

By Section 4482 of that Code it is provided: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter." The broad language here used, "all matters and questions arising out of," etc., cannot fail to strike the attention on a mere perusal of the section. And by Section 4484 of the same Code a like rule of construction is given for determining conflicting provisions found in different sections of the same chapter or article of the Codes: that is to say, the provisions of the section last in numerical order must prevail, unless such construction be inconsistent with the general meaning of such chapter or article.

Proceeding from these canons of construction, we arrive at the conclusion that there is no inconsistency or incongruity between the sections of the homestead law which we have been considering. For Section 1260 has its place in Chapter I, Title V, of Part IV, Division Second of the Civil Code, and Sections 1262 and 1263 have place in Chapter II of the same Title. Both chapters have relation to the same general subject-matter, namely, the homestead. But the first chapter contains general provisions which relate to the persons entitled to select homesteads, the property from which homesteads may be carved, the exemption of portions of homesteads from forced sale, the mode and manner in which they may be alienated, encumbered, or abandoned, and the remedies by which they may be subjected to the claims of execution creditors. On the other hand, the second chapter relates to the mode of the selection of the homestead, the form of the declaration by which its selection shall be made, its recordation, and the tenure by which the homestead, when selected, shall be held. The two sections of this chapter, therefore, relate wholly to the selection of the homestead. But Section 1260 of the first chapter relates to selection and something more—it declares that the head of a family shall be entitled to select and *claim* a homestead not exceeding in value \$5,000. By this language a different meaning is expressed and a different subject referred to from the meaning expressed, and the subject referred to in

the two sections of the second chapter. And assuming that a conflict exists between the sections or the chapters in which they are contained, each chapter must, according to the rules of construction in hand, be read by itself. So read and applied to the declaration of homestead before us, the declaration, appearing to have been made and filed in strict conformity with the provisions of Chapter II, assured to the declarant a homestead right to the premises described in his declaration. But his right in the premises was limited and defined by Section 1260 of Chapter I. Of those premises he could only claim and hold as against his creditors to the extent of \$5,000 in value. Beyond that value the premises were subject to the claims of execution creditors; the provisions of Section 1260 was therefore subservient to the higher object of the entire Title, namely, the protection by law of the homestead; and there is no inconsistency between the two chapters.

It cannot be denied that the entire legislation comprehended by the two chapters referred to was had for the purpose of carrying into effect the provisions of the Constitution expressed in Section 15, Article XI of the Constitution of 1849, and Section 1, Article XVII, of the Constitution of 1879, whereby the Legislature was commanded to "protect by law from forced sale a *certain portion* of the homestead and other property of all heads of families." Exemption of a portion of the homestead premises from forced sale was therefore the special subject-matter and object of Section 1260, Chapter I, of the homestead law. The entire property in such premises belonged to the owner; the title to it was vested in him; no legislation could divest him of it, and the premises were subject to the claims of his creditors, except so much of them as were exempted by law. But this exemption is not an attribute of the homestead—it is only an incident. In fact the homestead premises may exceed the value limit of the exemption; but the excess in value does not invalidate the selection, if it is otherwise valid under the provisions of Sections 1262, 1263, *supra*. The excess, though used in fact as homestead, is always subject to the claims of the creditors of the owner, and the law has provided ample remedies for the enforcement of such claims. (Sections 1245 to 1259, Chapter I, *supra*.)

In its inception, then, or thereafter, the substance of a homestead is a parcel of land on which the family reside. It is constituted by the attributes of residence and selection according to law. When these things exist so as to express its essence, the homestead becomes an estate in the prem-

ises selected exempted by law from forced sale. The premises may be of greater or less value than the interest in them exempted by law. If less it may increase; but increase in value over the exemption only works diminution in quantity of the homestead. The excess in value, though it may be homestead, in fact, is not the interest in the premises which is exempted from execution. It is, as part of the homestead, subject to the *jus disponendi* of the owner and the claims of his creditors. And where the excess is shown by the estimation of value at the time of the selection or by the increase of value after selection, there is no evasion of statutory requirements. In either case the rights of creditors are secured, and the rights of no one are interfered with.

Judgment affirmed.

We dissent: Myrick, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 7266.

DAVENPORT, RESPONDENT,

vs.

HIS CREDITORS, APPELLANTS.

INSOLVENCY—FRAUD—ISSUE—JURY. Issues having been raised upon the question of fraud on the part of the insolvent, it became the duty of the Court, by virtue of Section 20 of the Act of May 4, 1852, to summon a jury for the purpose of deciding on that accusation.

Appeal from Superior Court, San Francisco.

Sharp & Sharp, for appellants.

Du Brutz & Dickenson, for respondent.

Ross, J., delivered the opinion of the Court.

More care on the part of counsel in regard to references made in briefs would save the Court much time and labor. In this case, the counsel for both sides refer to the insolvency Act of 1876, as the one under which the proceedings were had, by number, to sections not found in that Act at all. The Act of 1876, has nothing to do with the case. The proceedings were had under the Act of May 4, 1852. Davenport filed in one of the late County Courts a petition praying to be adjudged an insolvent. Accompanying the petition was a schedule, in which Van Winkle was named as

one of his creditors. Van Winkle's claim against Davenport was based on some partnership transactions between the parties. Within ten days after the appointment of an assignee of the insolvent's estate, Van Winkle filed in writing his opposition to the discharge of the insolvent, and an application for the revocation of the appointment of an assignee, on the ground of fraud alleged to have been committed by Davenport. In his opposition, Van Winkle charged distinct acts constituting the alleged fraud on the part of Davenport, consisting, among other things, of the alleged fraudulent receipt and appropriation of a considerable portion of opponent's funds; and further charged that in an action between the parties in one of the then District Courts of the State, an account had been stated of the partnership affairs, by which it had been ascertained and found that there was a large indebtedness due from Davenport to opponent, for which judgment was entered. Davenport filed an answer, by which he put in issue the averments of fact contained in the opposition of Van Winkle. The judgment entered against Davenport in favor of Van Winkle was afterwards set aside by the Court in which it was entered, on the ground "that no notice was given" to Davenport's attorney, and subsequently Davenport moved in the insolvency Court to dismiss Van Winkle's application for the revocation of the appointment of the assignee and his opposition to the discharge of the insolvent, on the ground that he, Van Winkle, had "no status in Court on which to make such opposition." That motion was granted, and an order of discharge was subsequently entered.

The idea of the party making the motion, and of the Court in granting it, seems to have been that Van Winkle ceased to be a creditor of Davenport when the judgment entered in the District Court was set aside. But that was not at all so. If the facts stated in Van Winkle's opposition were true, he was a creditor; for in that it was distinctly charged that Davenport was indebted to him in the sum of \$17,281, received by him in a fiduciary capacity. Besides, in the schedule filed by the petitioner himself, Van Winkle is named as one of his creditors. Issues having been raised upon the question of fraud on the part of the insolvent, it became the duty of the Court, by virtue of Section 20 of the Act of May 4, 1852, to summon a jury for the purpose of deciding on that accusation.

Judgment and order reversed and cause remanded for further proceedings in accordance with the views here expressed.

We concur: McKinsty, J., McKee, J.

DEPARTMENT No. 2.

[Filed November 2, 1882.]

No. 7279.

NORCROSS, RESPONDENT,

VS.

NUNAN, SHERIFF, ETC., APPELLANT.

CLAIM AND DELIVERY—EXECUTION—ATTACHMENT—EVIDENCE—SHERIFF—JUSTIFICATION. Action for the recovery of personal property or its value, and damages for its detention. Plaintiff did not claim the delivery of the property before judgment. Defendant, Sheriff, justified under a writ of attachment and execution. *Held* (per *Myrick, J., Morrison, C. J.*, concurring), defendant was entitled to introduce the execution in evidence upon which to base the defense that a transfer to plaintiff was fraudulent and void as to creditors, conceding the affidavit for the attachment to have been defective.

Id.—Id. If there were irregularities in the proceeding for the judgment, such irregularities would not prevent defendant, as Sheriff, from justifying under an execution valid on its face.

Id.—COURT—JURISDICTION. The same rule applies to a Court of limited jurisdiction, if the subject-matter of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the person was not within it.

Id.—VERDICT—ELECTION. The Court instructed the jury to render a verdict for plaintiff for the property and to find the value thereof and the damages. The jury found the value and the damages, and returned a verdict for plaintiff for such value and damages, but did not find for plaintiff for the property. *Held, error.* Under this verdict and the judgment thereon defendant could not have elected to deliver the property.

Id.—Id. Per *Sharpstein, J.*, specially concurring: The objection does not specify wherein the affidavit is insufficient. On the argument it was suggested that it did not state whether the indebtedness was upon a contract, express or implied. It did state that it was "upon a contract for the direct payment of money, to wit, for labor and services performed for defendants at their request." That was sufficient.

Id.—FICTITIOUS PERSONS. It nowhere appears that John Doe Gordon and Richard Roe Cory were "fictitious persons," or that they were not the Gordon and Cory referred to in the answer.

Id.—SUMMONS. No particular fatal defect in the summons or judgment is pointed out, and an inspection fails to disclose any in either.

Id.—Id. The execution appears to be sufficient in form and substance, and the ruling of the Court excluding it was erroneous.

Appeal from Superior Court, San Francisco.

M. C. Hassett, for appellant.

J. C. Butes, for respondent.

MYRICK, J., delivering the opinion:

This was an action for the recovery of personal property or its value, and for damages for its detention. But the

plaintiff did not claim the delivery of the property to him before judgment. The defendant, Sheriff, justified under a writ of attachment and an execution.

1. Conceding that the Court below was correct in refusing to admit the writ of attachment in evidence because of the defect in the affidavit in stating that the amount claimed was due upon either an express or implied contract, yet the defendant was entitled to have the execution in evidence upon which to base the defense that the transfer of the property from Gordon and Cory to plaintiff was fraudulent and void as to creditors. We think the evidence of the plaintiff clearly shows that the transfer was void as to creditors. (Sec. 3440, Civil Code.) The Sheriff did not take the property from the possession of plaintiff; and even if there were irregularities in the proceedings for the judgment, such irregularities would not prevent the officer from justifying under an execution valid on its face. There is nothing on the face of the execution to show its invalidity. The rule is fully stated in *Freeman on Executions*, Section 101:

"The Sheriff may limit his inquiries to an inspection of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a Court competent to exercise jurisdiction over the subject-matter of the suit; to grant the relief granted and enforce it by the writ issued; and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause, the officer may safely proceed. That from some cause not shown in the writ, the judgment or writ was irregular or void, will be of no consequence to him. He can justify upon producing the writ. It is therefore immaterial to him that the judgment does not correspond to the writ or that there ever was any such judgment in existence."

The same rule applies to a Court of limited jurisdiction, if the subject-matter of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the person was not also within it. (*Savacool vs. Boughton*, 5 Wend. 170.)

2. The Court instructed the jury to render a verdict for plaintiff for the property, and to find the value of the property and the damages. The jury found the value of the property and the damages, and returned a verdict for the plaintiff for such value and damages, but did not find for the plaintiff for the property. This was error. Under this verdict and the judgment thereon the defendant could not have elected to deliver the property.

Judgment and order reversed and cause remanded for a new trial.

I concur: Morrison, C. J.

CONCURRING OPINION.

The defendant by way of justification alleged in his answer that he took and held the property sued for by virtue of an execution issued upon a judgment obtained in a Justice's Court by "one J. Murphy * * * against one Gordon and Cory." To sustain that allegation the defendant offered in evidence an affidavit and undertaking for attachment, and a writ of attachment in an action entitled, "*James Murphy, plaintiff, vs. John Doe Gordon and Richard Roe Cory, defendants,*" to the introduction of which the plaintiff's counsel objected "on the ground that the affidavit is insufficient, and that it is a fictitious person who is alleged to be indebted to Murphy and not B. B. Cory and Thomas H. Gordon." The Court sustained the objection and the defendant excepted. The objection does not specify wherein the affidavit is insufficient; but on the argument it was suggested that it did not state whether the indebtedness was upon a contract express or implied. It did state that it was "upon a contract for the direct payment of money, to wit, for labor and services performed for defendants at their request." That appears to be sufficient.

The second ground of objection is clearly untenable. It nowhere appears that John Doe Gordon and Richard Roe Cory were "fictitious persons" or that they were not the Gordon and Cory referred to in the answer.

Defendant next offered in evidence the summons and judgment roll in the same action. Plaintiff's counsel objected to their introduction "on the ground that the summons is void, and not sufficiently definite to apprise the defendant of the nature of the action, and that the judgment is void."

The objection was sustained and the defendant excepted. The attention of the Court is not directed by the objection to any particular fatal defect in the summons or judgment, and an inspection fails to disclose any such defect in either.

Finally, the defendant offered the execution in evidence, and "the same ruling and execution as last was made by the Court, and exception taken." The execution appears to be sufficient in form and substance, and the ruling of the Court was erroneous. Under the pleadings the evidence offered was clearly admissible, and the Court erred in sustaining the objections to its introduction.

I therefore concur in the judgment: Sharpstein, J.

DEPARTMENT No. 1.

[Filed November 10, 1882.]

No. 8443.

BAKER, RESPONDENT, VS. DICKSON ET AL., APPELLANTS.

FORCIBLE DETAINER—POSSESSION—SERVANT—EMPLOYEE—LAND. It is not necessary that the owner of land should be in actual and personal possession. Possession through servants and employees is sufficient. **ID.—ID.** In this case the Court below properly awarded judgment for plaintiff for the restitution of the premises.

Appeal from Superior Court, Santa Barbara County.

Rowell and Willis, for appellants.*Brunson & Wells and Gibson & Waters*, for respondent.

Ross, J., delivered the opinion of the Court:

This is a clear case. The evidence sufficiently shows that on the fourteenth day of September, 1881, the plaintiff was in the possession of the property described in the complaint—the Temescal tin mine, situated in San Bernadino County—and had been in such possession since the third of January of the same year. He was not there in person, nor was it necessary that he should be. He was there by and through his servants and employees. But their possession was his possession. It does not require the actual personal presence of the employer to constitute possession in him. It would be strange if it did.

On the fourteenth of September the plaintiff was in the possession of the premises through an employee of the name of West. During the evening of that day, one of the defendants—Hoag—went to the house occupied by West and wanted him to “go out prospecting.” The next morning Hoag returned and wanted West to go off prospecting with him. West declined, and while they were standing talking, the other defendants—Haight, Dixon, and Wyman—came up in a light wagon. They pretended to be hunters; and having inquired for water for their horses, and being directed by West to a spring some four hundred yards from the house, they drove in that direction. West remained around the house during the day and until late in the afternoon, when he went about a hundred yards below to see about his saddle horse. While he was gone, Dixon, who had been stationed in the vicinity, took possession of the house, and on West's return, was sitting in the door and forbid his entering. On his way back, West was passed by

Hoag, who was on horseback, and who rode hurriedly to the house, dismounted, and going to the kitchen door, said to West, as he attempted to enter, "Young man, you can't get in here; the ranch is jumped." West passed to the other door, and Dixon forbid his entering there. On being asked what he would do if he did, Dixon replied: "You come in, and I will d—m quick show you what I will do." Dixon and Wyman were armed. The "jumpers" proceeded to load West's personal effects in the wagon and hauled them off, and as Hoag started with the wagon, he said to Dixon, "If any one comes fooling around here, shoot h—l out of him." West, deeming discretion the better part of valor, saddled his horse and rode away. Thereupon the plaintiff demanded of defendants restitution of the premises, which demand being denied, he commenced the present action against them for the detention thereof, and was properly awarded judgment in the Court below.

If the defendants have rights in the property in question the law affords ample means for their assertion and vindication; but it does not sanction such proceedings as are disclosed by the record in this case.

Judgment and order affirmed.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed November 17, 1882.]

No. 7652.

PARNELL, APPELLANT, vs. HAHN, RESPONDENT.

FORMER RECOVERY—ESTOPPEL—BANK—DEPARTMENT. Opinion of Department No. 1 (9 Pac. C. L. J. 370), adopted by the Court in bank.

Appeal from Superior Court, San Francisco.

Newhall & Deuprey, for appellant.

Stanly, Stoney & Hayes, for respondent.

By the COURT:

An opinion in this case was filed in Department One on the 10th day of April, 1882 (9 Pac. C. L. J. 370), which is adopted as the opinion of the Court in bank. (See also *Ressequie vs. Byers*, 52 Wis. 650, and cases there cited.)

Judgment affirmed.

DEPARTMENT No. 1.

[Filed November 13, 1882.]

No. 7404.

DOUGHERTY, APPELLANT,

VS.

ROSENBURG ET AL., EXECUTORS, RESPONDENTS.

STATUTE OF FRAUDS—CONTRACT—ASSESSMENT—FORBEARANCE. The complaint alleged that plaintiff being about to commence separate suits against R. (defendants' testator), B., and H., for the enforcement of certain assessment liens against each of three several lots of lands owned by said persons respectively, R. verbally promised plaintiff that, in consideration that plaintiff would not bring the suit to enforce the lien against the lot owned by him, but would "altogether forbear" to bring such suit, and would commence and prosecute suits against B. and H. for the enforcement of said assessments against their lots respectively, and succeed in recovering final judgments in said suits against B. and H., he, the said R., would, upon such final recovery in said suits, pay to the plaintiff the amount of said assessment of the lot so owned by him. *Held*, such agreement is not void under the provision of the statute of frauds, requiring a writing for agreements that by their terms are not to be performed within one year from the making thereof.

Id.—Id. The agreement of the plaintiff was "altogether," not "always," to forbear, and an agreement to refrain altogether for an *indefinite* time is not within the operation of the statute.

Id.—Id. The promise of plaintiff was altogether to forbear to bring suit to foreclose the lien against the lot of R. until he should recover final judgments against B. and H.—events which might occur within the year.

Id.—Id. The statute does not declare void a contract which *may* not be performed within a year, or which is *not likely* to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year.

Appeal from Fifteenth District Court, San Francisco.

J. C. Bates, for appellant.

J. M. Taylor, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

The complaint alleges that plaintiff, being about to commence separate suits against Michael Reese (defendant's testator), J. W. Brittain, and D. V. B. Henarie for the enforcement of certain assessment liens against each of three several lots of land owned by said persons respectively, Reese, on the 20th day of May, 1870, verbally promised plaintiff that, in consideration that plaintiff would not bring the suit to enforce the lien against the lot owned by him,

but would "altogether forbear" to bring such suit, and would commence and prosecute suits against Brittain and Henarie for the enforcement of said assessments against their lots respectively, and succeed in recovering final judgments in said suits against Brittain and Henarie, he, the said Reese, would, upon such final recovery in said suits, pay to the plaintiff the amount of said assessment on the lot so owned by him, to wit, the sum of \$997.68, and interest thereon, etc.

The defendants demurred. The Court below sustained the demurrer, and, plaintiff declining to amend, rendered the final judgment in favor of defendants, from which plaintiff has appealed.

It is claimed by respondents that the agreement set forth in the complaint is void under the statute of frauds, in force when the agreement was made.

The twelfth section of the statute reads: "In the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith: 1. Every agreement that by its terms is not to be performed within one year from the making thereof." (Stats. 1850, p. 267.)

It is urged that if any part of the agreement is not to be performed within a year the entire agreement is void; that where, by its terms, it cannot be completely performed "on both sides" (*Broadwell vs. Getman*, 2 Denio, 89) until more than a year has elapsed, the case falls within the express words of the enactment. And—applying these principles to the case—it is said one of the promises of plaintiff is, by its terms, not to be performed within the year, to wit, the promise "always to forbear" to bring the suit. But the agreement of plaintiff was "altogether" not "always" to forbear, and an agreement to refrain altogether for an *indefinite* time is not within the operation of the statute. (Browne on the Statute of Frauds, 279.) As we construe the agreement, however, the promise of plaintiff was altogether to forbear to bring suit to foreclose the lien against the lot of Reese until he should recover final judgments in the actions against Brittain and Henarie—events which might occur within the year. Such was the evident intent of the parties. There is nothing in their language to indicate they intended, in case Reese did not pay when final judgments should be entered against Brittain and Henarie, the plaintiff should *further* forbear. It cannot be said, therefore, that by its terms the contract was not to be per-

formed within the year. The statute does not declare void a contract which *may* not be performed within a year, or which is *not likely* to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. (Browne, 273.)

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed November 15, 1882.]

No. 7454.

ROSENKRANTZ, APPELLANT,

VS.

WAGNER ET AL., RESPONDENTS.

MECHANICS' LIEN. The Court below rendered judgment in favor of defendants. *Held*, on appeal, the decree should have been for plaintiff. Not only did defendants, the Wagners, fail to give notice that they would not be bound for material furnished for the building or labor done at the instance of the principal contractor, but the Court below found, as a fact, they were notified, orally and in writing, that plaintiff had performed work, etc., for which he claimed \$60.80 *before* defendants made the payment of \$500 to the contractor.

Appeal from Third District Court, San Francisco.

Wood and Bates, for appellant.

T. F. Batchelder, for respondents.

By the COURT:

Not only did defendants, the Wagners, fail to give notice that they would not be bound for material furnished for the building, or labor done at the instance of the principal contractor, but the Court below found, as a fact, they were notified, orally and in writing, that plaintiff had performed work, etc., for which he claimed \$60.80, *before* defendants made the payment of \$500 to the contractor.

The decree should have been for plaintiff.

Judgment reversed and cause remanded for a new trial.

NOTE.—The judgment in above case was set aside November 17, as having been prematurely ordered.

DEPARTMENT No 2.

[Filed November 16, 1882.]

No. 8552.

HOLLAND, RESPONDENT, vs. GREEN ET AL., APPELLANTS.

FORCIBLE ENTRY AND DETAINER—THREATS—COMPLAINT—VIOLENCE. The complaint averred that "defendants unlawfully entered upon said land and turned this plaintiff out of the possession thereof by threats and menacing conduct, and ever since * * * have and still do hold the possession thereof by threats of violence against this plaintiff." *Held*, such averment brought the case within Section 1159 C. C. P., relating to forcible entry, etc. *Further*, the evidence supported the finding in favor of plaintiff.

ID.—EVIDENCE—LEASE—GOOD FAITH. The Court did not err in excluding evidence of a lease to one of the defendants, offered for the purpose of showing good faith in entering upon the land. (*Voll vs. Hollis*, 7 Pac. C. L. J. 725.)

Appeal from Superior Court, Los Angeles County.

Gould and Blanchard, for appellants.*Ellis and Bicknell & White*, for respondent.

By the COURT:

The first ground upon which appellants rely for a reversal of the judgment below is that the complaint is substantially defective. The averment is "that on the said 26th day of January, 1882, the defendant unlawfully entered upon said land, and turned this plaintiff out of the possession thereof, by threats and menacing conduct, and ever since that time said defendants have and still do hold the possession thereof, by threats of violence against this plaintiff." We think that the above averment brings this case within Section 1159, Code of Civil Procedure, which provides that "every person is guilty of a forcible entry * * * who after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession."

2. The second finding is that the defendants "then and there by force, threats, and menacing conduct toward the plaintiff, turned him out of the possession of said land, and ever since that time the defendants have and still do hold possession of said land;" and the evidence in this case was sufficient to support the finding.

3. The Court did not err in excluding evidence of a lease from Mary L. Gould to one of the defendants. (*Voll vs. Hollis*, 7 Pac. C. L. J. 725.)

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed November 15, 1882.]

No. 8378.

GARLICK, RESPONDENT, vs. BOWER, APPELLANT.

NEW TRIAL—VERDICT—DAMAGES. Action to recover possession of wheat or its value and \$150 damages. The answer contained a general denial and justification by attachment. The verdict was: "We, the jury in this cause, find a verdict for the plaintiff, Mrs. Garlick, and assess her damages at \$1,800." Held the trial Court properly set aside the verdict and awarded a new trial, on the grounds that the verdict was against law and the evidence, and the damages were excessive.

Id.—Id. The verdict did not cover the issues submitted to the jury. The value of the property was not found. The damages assessed were \$1,650 in excess of the damages claimed by the plaintiff.

Id.—Id. When the verdict was rendered by the jury it would have been proper for the Court to have called their attention to the fact that it was incomplete, and remanded them to put it in proper form; but having omitted to do that, it was not error afterwards to set it aside, on the motion for a new trial made by defendant.

Appeal from Superior Court, Kern County.

Smith and Hall, for appellant.

Freeman and Arick, for respondent.

By the COURT:

This was an action to recover possession of 1353 sacks of wheat or the value thereof (alleged to be \$1,750), and \$150 damages and costs. The answer contained a general denial and the defense of justification by attachment. The case was tried by the Court sitting with a jury and the trial resulted in the following verdict: "We, the jury in this cause, find a verdict for the plaintiff, Mrs. Garlick, and assess her damages at \$1,800." On motion of the defendant the Court below set aside the verdict and granted a new trial on the ground that the verdict was against law and the evidence, and the damages were excessive, etc., and from the order granting a new trial, the plaintiff appeals.

The verdict did not cover the issues submitted to the jury. The value of the property was not found. Besides, the damages assessed were \$1,650 in excess of the damages claimed by the plaintiff. The verdict was therefore against law and the evidence, and there was no error committed in setting it aside. When the verdict was rendered by the jury it would have been proper for the Court to have called their

attention to the fact that it was incomplete, and remanded them to put it in proper form; but having omitted to do that it was not error afterwards to set it aside, on the motion for a new trial made by the defendant.

Order affirmed.

DEPARTMENT No. 2.

[Filed November 14, 1882.]

No. 7314.

PHELAN, RESPONDENT,

VS.

CITY AND COUNTY OF SAN FRANCISCO, APPELLANT.

STREET ASSESSMENT—SIDEWALK—SEWER. Street assessment. "Conceding that for certain purposes the sidewalk is a portion of the street, we cannot say that Section 22 of Chapter 4 of Order 697 of the Board of Supervisors of the city and county of San Francisco, was intended to require the sidewalk as well as the roadway, to be sewered with brick and paved and curbed with stone."

Id.—Id. The sewer was to be of brick, and the roadway was to be paved and the sidewalk curbed.

Id.—Id. Each requirement was to have reference to the object to be accomplished, and the Board of Supervisors in accepting the street, determined that the respective objects had been accomplished.

Appeal from Superior Court, San Francisco.

J. L. Murphy, for appellant.

J. M. Wood, for respondent.

By the COURT:

Conceding that for certain purposes the sidewalk is a portion of the street, we cannot say that Section 22 of Chapter 4 of Order 697 of the Board of Supervisors of the city and county of San Francisco was intended to require the sidewalk, as well as the roadway, to be "*sewered with brick and paved and curbed with stone.*" As we understand, the sewer was to be of brick, and roadway was to be paved and the sidewalk curbed. These requirements appear to have been complied with. Each requirement was to have reference to the object to be accomplished; and the Board, in accepting the street, determined that the respective objects had been accomplished.

Judgment and order affirmed.

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No. 15.

Current Topics.

HUSBAND AND WIFE CANNOT STEAL FROM EACH OTHER

In the *Ohio Law Journal* (November 16th, 1882,) there is a decision by a *Nisi Prius* judge in Ohio, to the effect that it is not larceny for a husband to appropriate property belonging to his wife. In support of this decision the learned judge cites an array of authorities to show that at common law neither husband nor wife could be indicted for the larceny or embezzlement of the goods and chattels belonging to the other, because of the "*legal unity of the husband and wife.*" He also cites, to the same effect, the following decisions of Appellate Courts in States that recognize the separate estate of married women, viz.: 12 Casey (Penn.), 410; 44 Ill. 58; 43 Tex; 70 Ind. 317; and concludes by saying: "I cannot perceive that the separate property of the wife is now essentially different from the estate the husband held before the enactment of these statutes, or now holds in regard to his own property; nor any good reason, if *she* could not be liable for larceny or embezzlement of *his* goods before the enactment of these statutes, why *he* can be held so liable in respect to *her* property since." Why should she have been made liable for stealing from him by a system of law that took all from her and gave it to him? Under the common law regime a wife was a little above a slave, but not more than a daughter. She became bone of his bone and flesh of his flesh. What was hers became his, and what was his remained his own. Their legal unity was complete.

But now this legal union has been very much strained and weakened. The doctrine of secession is recognized, and is resorted to on the slightest pretext. In California she wields an undivided sway over her possessions. She can sue her husband for any appropriation or conversion of her goods and chattels. He can sue her (36 Cal. 453). If he beats her or maltreats her he can be arrested for so doing. Why, then, can he not be arrested for stealing from her? If a wife can sue her husband in conversion for appropriating to his own use her property, if she can attach his property in order to enforce payment of his indebtedness to her, if she can arrest him for assaulting her, she ought to be allowed the privilege of arresting him if he steals her money, or her jewelry, or her clothes. We would like to be on the bench when such a case came before the Court.

Supreme Court of California.

IN BANK.

[Filed November 16, 1882.]

No. 8052.

SPRING VALLEY WATER WORKS, APPELLANT,
VS.

SCHOTTLER ET AL., RESPONDENTS.

FRANCHISE—TAXATION—ASSESSMENT—EQUALIZATION—CORPORATION. Appeal from order of Superior Court denying application for writ of review, and confirming the action of the Board of Equalization of the city and county of San Francisco. The writ was sued out to review the action of the Board in raising the assessment of the franchise of appellant from \$5,000 to \$5,000,000, and to have it vacated and set aside as being in excess of the jurisdiction of the Board. *Held*, the right to collect rates for water supplied to the city and county of San Francisco or the inhabitants thereof, is a franchise, is property, and as such is a proper object of taxation.

ID.—ID. There can be no doubt of the power of the State to tax a franchise.

ID.—ID. If the value of a franchise may be ascertained for condemnation purposes, it may as readily be ascertained for the purposes of taxation. The tax must be according to a valuation made by the officer appointed for that purpose.

ID.—ID. The County Board of Equalization has full power to act on the assessment of a franchise, and increase or lower it.

ID.—ID. The Board of Equalization properly arrived at the value of the franchise by taking the aggregate of the market value of the shares of stock in the company on the seventh of March, 1881, and deducting therefrom the value of the real and personal property of the company, and holding the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of witnesses.

ID.—GOOD-WILL. "Good-will" does not enter into and form an element in the value of shares of stock in a corporation.

ID.—NOTICE. Service of notice to appear before the Board was properly given.

ID.—POLITICAL CODE. Section 3681, Political Code, has no application to this case.

ID.—APPEARANCE—WAIVER. All objections of mere form to the notice to appear were waived by the appearance of the attorney of petitioner.

ID.—ID. The reasonableness of the time given to show cause is in a great measure left to the discretion of the Board.

ID.—ID. Boards of Supervisors ought not to be held to any great strictness of procedure in the matter of giving notice of equalization; and if under a rule or an order of such Boards a party has notice of the intended action of a Board of Supervisors sitting as a Board of Equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the Board, such notice will be held sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the Board.

ID.—ID. The rule as to time here laid down is not intended to apply to a case where the law requires a notice of a definite number of days to be given, and no such notice has been given.

ID.—RULES—CERTIORARI. The rules of notice of the County Board of Equalization are no part of the record and proceedings on *certiorari*.

Appeal from Superior Court, San Francisco.

Fox & Kellogg and Newlands, for appellant.

Love and Burnett, for respondents.

THORNTON, J., delivered the opinion of the Court:

This is an appeal from an action of the Superior Court of the city and county of San Francisco, denying the application of the Spring Valley Water Works for a writ of review, and confirming the action of the Board of Equalization of the city and county above named. The writ was sued out to review the action of the Board of Equalization in raising the assessment of the franchise of the Water Works above named from \$5,000 to \$5,000,000, and to have it vacated and set aside as being in excess of the jurisdiction of the Board.

It is contended on behalf of the appellant that no notice as required by law was given to the Water Works, inasmuch as it was not given in accordance with a rule prescribed in advance by the Board. This Court has recently decided that these rules are no part of the record and proceedings to be brought upon *certiorari*. (*Garretson vs. Supervisors*, 9 Pac. C. L. J. 685.) This point will not, therefore, be further considered.

The next point relates to the service of notice. The transcript shows that notices to appear and show cause before the Board of Supervisors at their chambers in the New City Hall, on Friday, June 24th, at ten o'clock A. M., why the assessment of the Spring Valley Water Works should not be raised to \$14,000,000, addressed to the President and Secretary of the Spring Valley Water Works, were served on June twenty-third and twenty-fourth on these officers by leaving them (the notices) "at the office of the Spring Valley Water Works, at its principal place of business in the city and county of San Francisco." It also appears from the record that a notice addressed "to the Spring Valley Water Works Company, Charles Webb Howard, President, and William Norris, Secretary," was served on the twenty-fourth of June, 1881. This notice bore date the day just named, was entitled "In the matter of the equalization of the assessment of the Spring Valley Water Works Company," and the tenor of it was to inform and notify the Water Works Company that the petition to have the assessment on its franchise raised, then on file with the Board of Equalization, would be taken up and acted on by the Board at its chambers at the New City Hall, on Saturday, June 25th, 1881, at ten o'clock A. M., and

it was thereby cited to appear and then and there show cause why the petition referred to should not be granted. This notice issued by an order of the Board made on the twenty-fourth of June, 1881, and was served on the same day by leaving it at the office of the company as stated with regard to the notice first mentioned.

On the twenty-fourth of June, 1881, the Board took up the application to increase the valuation of the franchise of the Spring Valley Water Works. Charles N. Fox, Esq., attorney, then appeared and protested on behalf of the Spring Valley Water Works against a consideration of the application made in reference to said Water Works at that time for want of jurisdiction on the part of the Board, inasmuch as the Board had adopted no rule prescribing the form and manner of notice, and therefore any further action by the Board would be in violation of law, and that sufficient time was not allowed the Spring Valler Water Works as contemplated by law to prepare and present its case. He (Fox) stated that a notice had been served upon the Secretary of the company on the afternoon of the preceding day at four o'clock, just at the time of the closing of the office, to appear before the Board this morning. Afterwards, on the same day, Mr. Fox reiterated his objections to the Board's proceeding, and stated that the President of the company was out of town when the notice was served on the Secretary, and the notice to the President to appear was not received by him until this morning—meaning the morning of the twenty-fourth.

The Board determined the question of jurisdiction adversely to the contention of Mr. Fox. He (Fox) then requested that the hearing of the case be postponed until the next day (Saturday) or the Monday following, so as to give the company an opportunity for preparation and consultation. A like request for postponement on behalf of the San Francisco Gas Light Company was also made (the cases of these two companies were heard together), and on motion further action in the cases of the Spring Valley Water Works and the San Francisco Gas Light Company was postponed until the forenoon of the next day, Saturday, twenty-fifth of June, at ten o'clock. On the next day (25th of June) at the request of R. P. Clement, Esq., who appeared on behalf of the San Francisco Gas Light Company (the case of the company last named being heard with that of the Spring Valley Water Works), and requested a further postponement of the cases of both companies until two o'clock on that day, for the purpose of allowing the

respective counsel to have a consultation with the officers of the companies as to these cases. The cases of the above mentioned companies were afterwards on same day taken up for hearing, when the attorneys were called on to make an admission as to the value of the stock of the companies mentioned. Thereupon Mr. Fox stated that on yesterday he agreed, if ever the case reached that point, that he would admit that the market value of the stock (referring to the Spring Valley Water Works stock) on the seventh day of March, 1881, was par, reserving the right to object to its relevancy, but that on reflection he declined to appear for the water company further than to make the point made at the preceding meeting to the jurisdiction of the Board for want of notice to the company, and to repeat that no notice had been yet given the company. After this the Board proceeded to act upon the case of the Spring Valley Water Works, and raised the assessment as above stated.

It thus appears that after the Board had passed on the question of jurisdiction, Mr. Fox, who represented the Water Works, asked for a postponement of the case of the Water Works, which was granted, and that subsequently another postponement was granted. After this he declined further to appear, announcing his determination to rest on the question of jurisdiction.

It also appears that a notice addressed to the company was served on it on the twenty-fourth of June to appear on the next day and show cause why the assessment of its franchise should not be raised, and that on request two postponements were granted the company.

It is urged that the company was entitled to ten days' notice that the Board would act, by virtue of the provisions of Section 3681 of the Political Code. But that section has no application to such a case as this, as a careful perusal of it will show.

Mr. Fox appeared for the company on the notices served, and by such appearance we hold that all objections of mere form to the notice are waived. As to the reasonableness of the time given by the notice to the corporation to show cause, that is in a great measure left to the discretion of the Board of Supervisors. We cannot, under the circumstances, hold it unreasonable. The Board has but a limited period, under the law, to act on the assessment book, and the range of inquiry is within narrow limits. In determining the point as to the time allowed, we think it proper to take into consideration the fact that postponements were granted to the corporation whenever asked, up to the time that Mr.

Fox withdrew from the case and declined to act further for the company. This withdrawal and declination took place under circumstances which indicate that every reasonable request for time would have been granted by the Board. Even after the withdrawal of Mr. Fox, distinguished gentlemen, (F. G. Newlands and R. P. Clement, Esqs.), learned in the law, were by the Board heard at length as tax-payers in regard to the matter. It was claimed by them "that there was no franchise enjoyed by the water and gas companies." It is a fair inference from this that these gentlemen were heard in support of the pretensions of these companies. We refer to this last action by the Board as a clear indication that every reasonable request for time would have been allowed.

In our opinion (as intimated in *Patten vs. Green*, 13 Cal. 330) such tribunals as the Boards of Supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein; and if under a rule or an order of such Boards a party has notice of the intended action of a Board of Supervisors sitting as a Board of Equalization in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the Board, we shall hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the Board. Of course, the rule as to time here laid down, is not intended to apply to a case where the law requires a notice of a definite number of days to be given, and no such notice has been given. We think the contentions of appellant as to notice are untenable.

But it is said that there is a lack of jurisdiction of the subject-matter, that the Spring Valley Water Works has no property liable to assessment of the character of that upon which the increased valuation was placed by the Board of Equalization.

It appears from the petition that the Spring Valley Water Works was a corporation prior to the seventh day of March, 1881, organized and existing under the laws of this State, having its principal place of business and doing business in the city and county of San Francisco. All corporations organized under the laws of this State are, by the general law, vested with certain powers by express grant. This has been so since the passage of the first Act in 1850 in relation to corporations. (See Sections 1 and 2 of the Act of 1850 in Hittell's Gen. Laws, pp. 114, 115, as to corporations created prior to the Codes; as to those since see Civil Code, Sections 354, 355.) They are invested with further powers by

the particular Act under which they are incorporated, or by the title of the Code under which they are formed.

It appears from the statement of one of the counsel for petitioner that the Spring Valley Water Works is a corporation formed and doing business under an Act passed April 14, 1853, for the formation of corporations for business and commercial purposes, and an Act passed April 22, 1858, entitled "An Act for the incorporation of water companies."

Under the laws of the State this corporation has power to have succession by its corporate name for a period of time (which must not exceed fifty years), to sue or be sued in any Court, to make and use a common seal and alter the same at pleasure, to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, to appoint such subordinate officers and agents as the business may require, to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs and the transfer of its stock, as well as all power necessary to the exercise of the expressly granted powers. (See sections of Act of 1850 above cited and Section 4 of Act of 1853 above referred to. Hittell's Gen. Laws, pp. 147, 148.) It has also the power under the Act of 1858 (see Stats. 1858, p. 213) to purchase or to appropriate and take possession of, and to use and hold, all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. This last power enables the corporation to purchase the land and waters required for its business against the will of the owner, by availing itself of the provisions of the laws, for the condemnation of land; in other words, to acquire such lands by the exercise of the power of eminent domain. It has the right also under the Act of 1858, subject to the reasonable direction of the Board of Supervisors, to use so much of the streets, ways, and alleys of the city of San Francisco as may be necessary for laying pipes for conducting water into the city, or any part of it, and also the right to furnish water to the inhabitants of the city and county of San Francisco, and, as this Court has recently determined, to the city also. The water so furnished is to be paid for at rates to be fixed each year in a mode established by law. A further power or right inhering in this company by the laws of the State, was the power or right to divide its capital stock into a number of shares which are personal estate, each share representing a minute fractional part of such stock, and each share capable of ownership, of being sold and bought and transferred by a simple process, of passing by will, or to

one's heirs after his death through the medium of an administration, and each share securing to the owner a right to participate in the profits and property of the company.

The Spring Valley Water Works on and prior to the 7th day of March, 1881, existed and had the right given by law to exist, with the powers and rights above set forth. It should be added here that the before-mentioned powers, or privileges, were supplemented by a further grant, which inured to the advantage of the petitioner, which will be found in the third section of the Act of 1858, by which all the privileges, immunities, and franchises that might be thereafter granted to any individual, or corporation, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, were also granted to all companies incorporated before or after the passage of that Act. This last grant is a very important and valuable privilege, and, in fact has been very valuable to the Spring Valley Water Works.

Blackstone says in relation to franchises: "Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the King's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite;" and adds, "that they may be vested in either natural persons or bodies politic; in one man or in many." And again on this subject he says: "To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; each individual member of such corporation is also said to have a franchise or freedom." (2 Blacks. Com. 37.)

Kent defines franchises as "privileges conferred by grant from government, and vested in individuals." (3 Kent's Com. 458.) He also says: "Corporations or bodies politic are the most usual franchises known in our law." (Id. 459.)

In *Pierce vs. Emery*, 32 N. H. 507, Perley, C. J., speaking for the Court, remarks: "A corporation is itself a franchise belonging to the members of the corporation; and a corporation being itself a franchise, may hold other franchises as rights and franchises of the corporation." And further: "A corporation, being itself a franchise, consists and is made up of its rights and franchises."

In *City of Bridgeport vs. N. Y. & N. H. R. Co.*, 36 Conn. 266, Butler, J., speaking for the Court, uses this language in regard to a railroad corporation: "The term 'franchise' has several significations, and there is some confusion in its use. The better opinion deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant." (See title "Franchise" in Abbott's Law Dict., and cases there cited.)

It is true that the privileges so granted by the Government do not pertain to the citizens of the State by common right. But what is the "*common right*" here referred to? Is it not a right which pertains to the citizens by the *common law*, the investiture of which is not to be looked for in any special law, whether established by Constitution or an Act of the Legislature? Coke says "*De commun droit*—of common right—this is by the common law, because the common law is the best and most common birthright that the subject hath for the safeguard and defense not only of his goods, lands, and revenues, but of his wife and children. * * * This common law of England is sometimes called right, sometimes common right, and sometimes *communis justitia*." (Coke's Inst., 142a.) The definition of franchises as special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right, had its origin in *Bank of Augusta vs. Earle*, 13 Peter's Rep. 575. A very learned and accurate writer, Mr. Emory Washburn, in his work on real property, 2d vol. 267, adopts this definition, and cites as authority the case above referred to from 13th Peters. The same definition is quoted by Angell & Ames in their work on Corporations, from the case referred to. (See Angell & Ames on Corp., Sec. 4.)

In the case in 13th Peters, it was contended that under the laws and Constitution of Alabama the right of banking was a franchise. The Court refused to so hold on the ground that the right of banking, *at common law*, belonged to every citizen. (See also *Curtis vs. Leavitt*, 15 N. Y. 170, opinion of Shanklin, J.) The discussion on the point in the opinion shows clearly that "common right" is used with the signification of "common law."

We are of opinion that the common right refers to the right of citizens generally at common law. Such rights of citizens, though frequently spoken of as franchises, are not the franchises here meant; and it may be conceded that where such rights are granted to corporations, they are not franchises. But independent of the right to exist as a cor-

poration and to exercise powers in its corporate capacity, there are privileges granted to the Water Works, which do not, by the common law, belong to citizens generally: such as the right to lay down pipes in the streets, ways, and alleys of a city, and to collect rates for water furnished, which was held to be a franchise in *San Francisco vs. Spring V. W. Works*, 48 Cal. 539, and in *San Jose Gas Co. vs. January*, 57 Id. 616. Conceding for the argument that the Constitution by Section 19 of Article XI grants this right to every person, it does not follow that it is not a franchise. They are vested by a grant of the sovereign power and not by the common law; and the generality of the grant does not deprive them of the character of franchises.

The right to collect rates for use of water supplied to the city and county of San Francisco or the inhabitants thereof, which the appellant has possessed at least ever since the Act of 1858 went into effect, is expressly declared to be a franchise by the Constitution of the State in the second section of Article XIV thereof.

As has been said above, the very existence of a corporation as such is a franchise, and it exercises its franchise in every act which it performs as a corporation. In the *Bank of Augusta vs. Earle*, above cited, the Supreme Court of the United States, speaking through Taney, C. J., in relation to the making of contracts by corporations, which, by common right individuals could make, said: "In making such contracts a corporation, no doubt, exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence is a franchise."

A corporation, whose existence is a franchise, may possess powers and privileges, which, in themselves, are not franchises (such as the right to bank, discussed in *Bank of Augusta vs. Earle*, above cited, or the right to buy and sell property, real and personal), but it usually owns along with such privileges some that are franchises; but whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise. This we think abundantly established by the cases above cited.

We have no doubt that it was the intention of those who framed and ratified the Constitution to place such franchises in the category of property to be taxed. The word "*franchises*," as used in the first section of Article XIII, is used generally without any qualifying words, and is intended to embrace all franchises of the character above referred to, whether vested in individuals or bodies politic. A fran-

chise conferred on an individual to lay down pipes in the streets of a city and to collect rates for water furnished a city or its inhabitants, is to be taxed in the same way as when vested in corporations. The law in this respect is the same in regard to all persons, whether natural or artificial.

It is contended that the clause "and all other matters and things real, personal, and mixed, capable of private ownership" in Section 1 of Article XIII qualifies the word "franchises" which precedes it. We do not think so. The structure of the sentence forbids any such construction. What is said before the employment of these words is complete of itself, and needs nothing to show what was signified. The words used show clearly that they were intended to add something to what preceded them, to refer to kinds of property not previously mentioned, not to qualify anything. They were doubtless inserted out of abundant caution to show that all kinds of property, whether specifically enumerated or not, were intended to be included in the property to be taxed, though not embraced in the specific classes previously mentioned. They constituted a declaration that in enumerating the property to be taxed it was not intended to confine the enumeration to "moneys, credits, bonds, stocks, dues, franchises," but to include all other kinds of property, and that by no construction of the word property, as used in the section, were any kinds of property to be left out.

But it is immaterial whether these words qualified "franchises" or not, for the reason that the franchises so referred to are capable of private ownership. To hold that a private corporation does not own its franchise right, powers, and privileges would be both novel and untenable. Admitting that under the law of the State there may be legislation which might impair their value, it does not follow that it is not owned as property, with all the rights which attach thereto. All these rights exist until the legislative authority has acted so as to impair them or take them away; and until such legislation is enacted the rights of property remain unimpaired. There has been no legislation yet of the character as regards the appellant that has been called to our attention or that we have been able to discover.

This franchise of a corporation is sometimes classed as real estate—of that kind styled incorporeal hereditaments. (*Enfield Toll Bridge Co. vs. Hartford and New Haven R. R. Co.*, 17 Conn. 40; *S. C. Id.* 462; *Price vs. Price's Heirs*, 6 Dana 107; 1 Blackstone's Com. 20 1-2, 37, 38.) In the case cited from 17th Conn. 40, this was said of a bridge corporation. The shares of stock of the Water Works are, by

statute, made personal estate. (See Sec. 9, Act of 1853.) But whether real or personal estate, they are property. Such franchises as long as they exist are protected *as property* by the guarantee universal in the States of the Union, which forbids their being taken except for public purposes and on compensation being made. (1 Cooley's Con. Lim. 4th edit. 655, and cases cited in note 4.) During their existence they are as fully protected by law as any other species of property. On this subject see *Wilmington R. Co. vs. Reid*, 13 Wallace 268; 3 Kent's Com. 458; *Hamilton Co. vs. Massachusetts*, 6 Wall. 638; *People vs. Selfridge*, 52 Cal. 350; *T. & T. R. Co. vs. Campbell*, 44 Id. 89; *O. R. R. Co. vs. O. B. & F. V. R. R. Co.*, 45 Id. 365. See cases just above cited from 17 Conn., and *Norwich Gas Light Co. vs. Norwich City Gas Co.* 25 Conn. 36.

The franchise of a corporation is and can be well defined to be the right of the corporation to exist and exercise the powers and privileges vested in it by its charter. (Burroughs on Taxation, Sec. 83.) The franchise is the faculty of the corporation. As said by Redfield in his work on railways: "The faculty of a corporation is its organic life; its corporate existence by which it is enabled to carry on business; that which it derives from its charter of incorporation, its corporate franchise." (2 Redf. on Railways, 3d ed. 452.) In this State, the charter is the statute or statutes granting and defining the powers of the corporation, under which it is constituted and exists, together with the instruments required to be executed by the provisions of such statute or statutes. These are sometimes called the constating instruments. (Field on Corporations, Sec. 34, N. 3.) Such franchises are legal estates, not mere naked powers, and are powers coupled with an interest, which vest in the corporation by virtue of its charter or constating instruments. (*Society for Savings vs. Coits*, 6 Wall. 606; *Provident Institution vs. Massachusetts*, Id. 622; *Hamilton Co. vs. Mass.*, Id. 638; *Porter vs. R. R. I. and St. L. R. R. Co.*, 76 Ill. 573.) That the State has full power to tax them, see same cases, and State R. R. Tax Cases, 92 U. S. 603. In the case from 76 Illinois, above cited, it is said: "It is clear upon authority that the franchise of a corporation is property, and as such it may be a proper object of taxation." (p. 573.) In *Veazie Bank vs. Fresno*, 8 Wall. 547, Chase, C. J., used this language: "Franchises are property, often very valuable and productive property, and seem to be as property objects of taxation as any other property." Daniel, J., delivering the opinion of the Court in *West River Bridge Co. vs. Dix et al.*,

6 How. 529, said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property and nothing more." (See, also, *Wilmington R. R. Co. vs. Reid*, 13 Wall. 264, and *Monroe Savings Bank vs. the City of Rochester*, 37 N. Y. 367.) In this last case, Fullerton, J., delivering the opinion of the Court said, in regard to a statute declaring the privileges and franchises granted by the Legislature to savings banks or institutions for savings, personal property and liable to taxation as such: "In declaring the privileges and franchises of a bank to be personal property, the Legislature has adopted no novel principle of taxation. The powers and privileges which constitute the franchise of a corporation are, in a just sense, property, and quite distinct and separate from the property, which, by the use of such franchise, the corporation may acquire. They are so regarded by the law and so regarded by common acceptation."

That such franchises can be taxed according to valuation arrived at through an assessment, is recognized in the case of *the Freight Tax*, 15 Wall. 282, and in the case of *The State Tax on Railway Gross Receipts*, Id. 296. In the case of the *State Railroad Tax Cases*, above cited from 92 U. S. Reports, a tax on the assessed value of franchise and capital stock by the State of Illinois was sustained, approving the decision to that effect in *Porter vs. R. R. I. & St. L. R. Co.*, above cited from 76 Illinois. (See, also, *Gordon vs. Appeal Tax Court*, 9 How. U. S. 133, and Judge Redfield's comment on this case in 2 Redf. on Railways, 453.) As to the extent of the power of the State to tax, see *Providence Bank vs. Billings*, 4 Peters, 562, and *Hamilton Co. vs. Massachusetts*, 6 Wall. 639. In the case in 4 Peters, Marshall, C. J., said: "All powers * * * over which the sovereign power of a State extends are subjects of taxation. The sovereignty of a State extends to everything which exists by its authority or is introduced by its permission." (4 Peters, 563.) The same doctrine was declared in *Osborne vs. Bank*, reported in 9 Wheaton 738. From the foregoing cases, it would seem that there can be no doubt of the power of a State to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated. When it is condemned for public use, the compensation to be paid can be fixed. As is justly said in *Porter vs. R. R. I. & St. L. R. Co.*, 76 Ill. (see p. 578,) "We have never known it to be asserted that the value of a franchise is so indefinite and uncertain that it cannot be made the measure of a recovery

when it is wrongfully invaded; nor that when it is taken and condemned for public use, it cannot be ascertained what compensation shall be made to its owner. It is recognized in those respects as being capable of a definite valuation. * * * If its value may be ascertained for those purposes, it may as readily be ascertained for the purposes of taxation." As to value of franchises and that they possess a value beyond that belonging to the tangible property of the corporation, see cases just above cited. (*Commonwealth vs. Hamilton Manufacturing Co.*, 12 Allen, 298, and *Commonwealth vs. Cury Improvement Co.*, 98 Mass. 23.)

In this State, the Constitution having declared that franchises are property, and that all property in the State not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law, (Const. Art. XIII, Sec. 1,) it would seem to follow that the tax must be according to a valuation made by the officer appointed for that purpose. If the State can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an assessor.

That such a franchise as that held by the appellant was taxable in this State, we think has been held by this Court in two cases: *Burke vs. Budlam*, 57 Cal. 594, and *San Jose Gas Company vs. January*, Id. 614. In *Burke vs. Badlam*, an application was made to this Court for a writ of mandate to compel the Assessor of the city and county of San Francisco to assess to certain holders of certificates of stock in various corporations the respective shares held by them in such corporations, respectively, etc. The corporations mentioned in the petition for the writ, were the Nevada Bank of San Francisco, the San Francisco Gas Light Company, the Golden City Chemical Works, the Selby Smelting and Lead Company, and the Virginia and Gold Hill Water Company. This proceeding was with reference to the assessment of 1881-2.

In deciding the case, the Court properly assumed, as it had a right to do, nothing appearing to the contrary, that the assessor would assess in due time, to the various corporations, all of their property of every character, as required by the law.

It was claimed by the petitioner according to the report of the case, that the assessor must assess to the respective corporations all of their property of every kind, including their franchise, and to the individual stockholders thereof, the respective shares of the capital stock held by them. "If this would, in effect," said the Court, per Ross, J., "be as-

sessing the same property twice for the same tax, it cannot be done." (57 Cal. 600.) The Court then proceeds to declare that under the Constitution double taxation was neither required nor permitted, but was forbidden, and then passes to the consideration of the question whether an assessment as contended for (stated above) would be, in effect, assessing the same property twice for the same tax.

In discussing this question, the Court, after referring fully to the first section of Article XIII of the Constitution, said: "Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If this is taken away what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—its franchise and all its other property of every character—then all the stock of the corporation is assessed, and the mandate of the Constitution is complied with." Further on in the opinion this is said: "To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and, in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is property. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of the partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all its property, which, it must be remembered, includes its franchise, and the stockholder has no longer any property." (57 Cal. 601-2.)

The conclusion is reached that when the law is complied with by assessing all the property of the corporation, which property includes the *franchise* of the corporation, to assess the shares would be double taxation, because it would be in effect to assess the same property twice for the same tax, which the Constitution forbids. It is held in the judgment pronounced that the franchise of a corporation of the char-

acter of those named in the petition is the property of the corporation, and that as property it is taxable.

In *San Jose Gas Company vs. January*, 57 Cal. 516, this Court held that the tax of a franchise was legal. The franchise in that case pertained to a corporation for manufacturing and selling gas to the city and inhabitants of San Jose. The particular franchise to which the attention of the Court seems to have been directed in that case was that of using the streets and laying pipes therein for supplying a city with gas. The Court said this was a franchise, and by Section 1 of Article XIII of the Constitution, franchises are declared to be property for purposes of taxation. It was argued for appellant that such a franchise as the one mentioned had no value. It was said by the Court, per Myrick, J., in reply to this contention: "The method of assessment, and by whom, was to be and was provided by law. Therefore it does not rest with the plaintiff or with the Courts to determine that its franchise had no value. In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this State."

At the time that the action to which this case relates was taken by the Board of Equalization, and at the time at which the matters in controversy in *Burke vs. Badlam* originated, the Legislature had acted in regard to the assessments of property, and enacted as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor." (Pol. Code, Sec. 3608.) (It may be here remarked that the constitutional validity of this section was affirmed in *Burke vs. Badlam*. See 57 Cal. 602.)

"All property in this State not exempt" (stating the exemptions allowed by the Constitution, etc.) "is subject to taxation as in this Code provided" * * * (Pol. Code, Sec. 3607.) In Section 3617, Political Code, which is a definition of terms employed in relation to revenue and taxation, it is provided that "the term 'property' includes

moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." It is further provided in the same section that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor;" and that "the term 'personal property' includes everything which is the subject of ownership not included within the meaning of the term real estate." In the Political Code the word person includes a corporation as well as a natural person. (Sec. 17.) Each person (which includes corporations) must furnish a statement of property, real and personal. Each person must insert in the statement of his property "all property belonging to, or claimed by, or in the possession, or under the control or management of any corporation of which such person is President, Secretary, Cashier, or Managing Agent." (Pol. Code, Sec. 3629, Subs. 1, 2, 3.) As *property* includes *franchise*, the latter must be inserted in the statement.

The assessor must prepare an assessment book, with appropriate headings, etc., in which must be listed all property within the county. In this assessment book must be specified in a separate column, under its appropriate head, all personal property, showing the number, kind, amount, and quality, and also the cash value of all personal property, exclusive of money. (Pol. Code, Sec. 3650, Subs. 4 and 10.)

In Subdivision 15 of the same section it is provided that "each franchise must be entered on the assessment roll, without combining the same with other property, or the valuation thereof."

The assessor must complete the assessment book on or before the first Monday in July in each year (Pol. Code, Sec. 3652), and as soon as completed, he must deliver this book, with the map book (see Sec. 3653) and *statements*, to the clerk of the Board of Supervisors, who must immediately give notice thereof and of the time the Board will meet to equalize assessments, * * * and in the mean time the book must remain in his office for the inspection of all persons interested. (Sec. 3654.) The section in relation to the power of the Board to equalize, so far as material herein, has been already quoted. (Sec. 3673.)

The power to act on each and every assessment is conferred on the Board, and to increase or lower it so as to make it conform to the true value in money of the property mentioned therein.

The above citations from the Political Code show that the Board has full power to act on the assessment of the franchise and increase or lower it as provided in Section 3673.

It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the company on the 7th of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of witnesses. Such a mode of arriving at the value of the franchise appears to have been adopted by the assessor in *San Jose Gas Co. vs. January*, 57 Cal. 614, and this mode was held to be within the powers vested in the assessor. It was also impliedly approved as a correct mode in *Burke vs. Badlam*, above cited. (See *Commonwealth vs. Hamilton M'fg Co.*, 12 Allen, 306.)

If such power is vested in the assessor, it was also vested in the Board of Supervisors in exercising their powers under the Constitution and statute of this State. (See Pol. Code, Sec. 3679, as to what the Board may use in its function of equalization.)

In addition to what has been said above as to the action of the Legislature, it should be stated that on the same day on which it passed Section 3608 of the Political Code above quoted, it repealed Section 3640 of the same Code, which was as follows: "Each person, firm, or corporation, owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint stock company, shall be assessed therefor. If the corporation, association, or joint stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations, and joint stock companies whose principle place of business is not within the State, must be individually assessed for such stock. Shareholders, in the statement required by Section 3629 of this Code, shall specify the number of shares of stock held by them, and the name of the corporation. The owner of shares of stock, to be entitled to the deduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint stock company."

By this section, which was repealed as above, it will be

seen that the whole property of the corporation, including franchise and other assessed property, would have been taxed. This was by the operation of the section to have been brought about by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, as was done in Section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; that everything entering into and giving value to the shares should be taxed. It cannot be doubted that the Legislature in acting on the subject of revenue and taxation during the session of 1881 did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations should escape taxation. To come to any other conclusion, would be to impute to that body a most culpable dereliction of duty.

There is a further point, which we think it proper to notice. It is contended that good-will enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any holding or even intimating that this is so. We find no such element of value in the least hinted at by any one who has written on the subject, nor has any such been called to our attention. We cannot recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate good-will as pertaining to or extending to an abstraction, to an "artificial being, invisible, intangible, and existing only in contemplation of law."

Our conclusion is that the Board of Supervisors, in its capacity of a Board of Equalization, had jurisdiction of the person and subject-matter in the matters involved in this cause, and the judgment of the Court below is affirmed.

We concur: Ross, J., Myrick, J., McKinstry, J., McKee, J., Sharpstein, J.

(Morrison, C. J., did not participate.)

IN BANK.

[Filed November 16, 1882.]

No. 8223.

SAN FRANCISCO GAS COMPANY, APPELLANT,

vs.

SCHOTTLER ET AL., RESPONDENTS.

FRANCHISE—TAXATION—EQUALIZATION. *S. V. W. W.* vs. *Schottler et al.*,
No. 8052, November 16, 1882, followed.

Appeal from Superior Court, San Francisco.

Clement & Clement, for appellant.*Love and Burnett*, for respondents.

By the COURT:

Upon the authority of *Spring Valley Water Works* vs. *Schottler et al.*, No. 8052 (opinion this day filed), and for the reasons given in the opinion, the judgment of the Court below is affirmed.

(Morrison, C. J., did not participate.)

DEPARTMENT No. 1.

[Filed November 23, 1882.]

VAUGH, RESPONDENT, vs. WERLY ET AL., APPELLANTS.

APPEAL—TRANSCRIPT—DAMAGES. On dismissal of appeal for failure to file transcript upon Clerk's certificate, damages will not be imposed.

Id.—Id. In the absence of the transcript there is nothing from which to determine that the appeal was taken for delay.

Hale & Craig, for appellants.*John M. Fulweiler*, for respondent.

By the COURT:

No transcript on appeal has been filed. The certificate of the Clerk below is on file, showing the matters required by Rule IV of this Court. The appeal is dismissed.

We are asked to affix damages. The statute authorizes damages on affirmance of the judgment, if it appear that the appeal was taken for delay. In the absence of the transcript we have nothing from which to determine that the appeal was taken for delay. Application for damages denied.

IN BANK.

[Filed November 21, 1882.]

No. 10,752.

PEOPLE, RESPONDENT, VS. SALORSE, APPELLANT.

EMBEZZLEMENT—LARCENY—HORSE—ANIMAL. Defendant, in the county of San Benito, hired a horse from its owner for a term of two months, and agreed that he would use it exclusively in San Benito County, and redeliver it to the owner at the end of the term, and then pay for its hire. Under this contract the horse was delivered to defendant, who used it for about a month in San Benito County; afterward he took the horse out of the county, without the consent of the owner, into the counties of Merced, Stanislaus, and San Joaquin, where he tried to dispose of it; and he never returned the horse to its owner, nor settled for its hire, but converted the same to his own use. *Held*, defendant was properly convicted of embezzlement.

ID.—ID. Defendant became bailee of the horse for the owner, and continued to hold it as such until he absconded from the county of San Benito, taking the horse with him; that act being in violation of his duty as bailee and connected with the fraudulent intent to appropriate the horse and to deprive the owner of it, as the jury found by their verdict, constituted embezzlement and not larceny.

ID.—VALUE. In embezzlement of a horse value cuts no figure; such embezzlement is punishable without reference to the value of the animal.

ID.—INSTRUCTION—BOUNDARY LINE. An instruction requested by defendant was properly refused, because there was no evidence tending to show an appropriation by defendant at the time of receiving the horse. Another, as originally presented, was incorrect, because the fact that the horse might have been taken by defendant and feloniously converted to his own use in any of the counties specified within 500 yards of the county of San Benito was ignored. Instead of modifying the instruction, the Court should have refused it. But in modifying it the Court must have referred either to the appropriation of the horse within the 500-yard belt between the county of San Benito and any of the outside counties specified in the original instruction as presented (because the Court had previously fully instructed the jury upon that point,) or to the original taking in the county of San Benito.

ID.—ID.—JURY. The appellate Court will not set aside the verdict and grant a new trial, even if it should find in the record an erroneous instruction, which was not calculated to mislead the jury, and where the jury were bound to find as they did.

ID.—APPEAL—OBJECTION—TRIAL—TESTIMONY. An objection to the admission of testimony cannot be made for the first time in the appellate Court.

ID.—WITNESS—IMPEACHMENT. To impeach a witness, time, place, and person present must be indicated by the question. (2054, C. C. P.) Further, if the ruling sustaining an objection to the question was erroneous, it was error without injury, as witness subsequently answered a like question without objection.

Appeal from Superior Court, San Benito County.

Burchard and Scott, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

This case arises out of an information against the defendant for embezzlement. Conviction followed the trial of the defendant, and on this appeal from the judgment and order denying his motion for a new trial, it is contended on his behalf that the conviction is erroneous, because the offense committed, if any, was larceny, not embezzlement.

The evidence went to prove that the defendant in March, 1879, in the county of San Benito, hired a horse from its owner for a term of two months, and agreed that he would use it exclusively in San Benito County, and redeliver to the owner at the end of the term, and then pay for its hire. Under this contract the horse was delivered to the defendant, who used it for about a month in San Benito County, but afterward—some time in April, 1879—he took the horse out of the county, without the consent of the owner, into the counties of Merced, Stanislaus and San Joaquin, where he tried to dispose of it by sale or raffle, and he never returned the horse to its owner nor settled for its hire, but converted the same to his own use.

1. The proofs did not make out a case of larceny. Larceny is the felonious stealing, taking, carrying, or driving away the personal property of another. (Sec. 484, Pen. C.) When the act of taking co-exists with a felonious intent to deprive the owner of his property, the offense is complete; hence, if at the time of receiving the horse from its owner the defendant had conceived the fraudulent intent to take it and convert it to his own use, and to deprive the owner of it, and did, in fact, obtain the possession for that purpose, he would have been guilty of larceny, because the fraudulent receipt of the property of another, amounts in law to a taking without his consent. But here there was no charge against the defendant, and no proof that the original taking was felonious. The horse was intrusted to the defendant by the owner for a lawful purpose. There was nothing in the evidence which tended to prove that the defendant received it otherwise than for that purpose; therefore the delivery was such as to divest the owner of the possession of his horse and to vest it in the defendant, for the time expressed in their contract, to be restored at the end of that time to the owner in San Benito County. In taking the horse for that purpose, the defendant became bailee of it for the owner, and continued to hold it as such until he absconded from the county, taking the horse with him. That act being in violation of his duty as bailee and connected with the fraudulent intent to appropriate the horse

and to deprive the owner of it, as the jury found by their verdict, constituted embezzlement and not larceny.

2. But it is also urged that if embezzlement, the conviction is erroneous, because the property stolen did not exceed \$50 in value; and as embezzlement is punishable as larceny, the offense was a misdemeanor, and the action was barred by the statute of limitations. If the offense was a misdemeanor it was barred, because the information was filed more than a year after its commission. (Sec. 801, Pen. C.) But it was not a misdemeanor unless the value of the property stolen constituted an element in the offense. As to the fact of value there is no conflict in the evidence. The horse did not exceed in value \$50, and, in ordinary cases, this would amount to petit larceny and would be a misdemeanor. In such cases it is true as a general rule that the value of property stolen must be alleged and proved; but there are exceptions to the rule in favor of a particular species of property designated by the Legislature. Thus, grand larceny is defined to be "larceny committed of a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog." (Pen. C. Sec. 487, Sub. 3.) Any one of those enumerated animals is made by the law the subject of larceny or embezzlement without reference to its value; the law makes no distinction between grand and petit larceny as in the theft of other species of property. It fixes a definite punishment for the stealing of a horse, whether its value be \$500 or only \$5. The value of the horse was therefore not an ingredient of the offense of stealing the horse, and it was not necessary to aver or prove its value; therefore the instruction which the defendant requested to be given to the jury, to the effect that if the value of the horse did not exceed \$50, and if the embezzlement of the horse took place more than a year prior to the filing of the complaint before the committing magistrate, they must acquit, was properly refused. (*People vs. Leehy*, 4 Pac. C. L. J. 75.)

3. It is next assigned as error that the Court refused to give an instruction to the jury at the request of the defendant, to the effect that if the defendant, at the time of receiving the horse from its owner in the county of San Benito, intended to feloniously steal, convert, or appropriate it they should acquit, and gave the following instruction, namely: "If you believe from the evidence that the horse was given into the hands of defendant by the complaining witness, in the county of San Benito, and that it was afterwards taken by defendant into the counties of Merced,

Fresno, or any other county than the county of San Benito, and by him in such county lost or converted to his own use, you cannot convict, unless you also find that defendant, at the time of receiving the horse, intended to feloniously appropriate it to his own use."

The first of these instructions was properly refused, because, as has been already stated, there was no evidence tending to show an appropriation by the defendant at the time of receiving the horse. The second of the instructions, as appears by the record, is marked "given with the words of qualification contained in the last part of the instruction."

As it was originally presented, the instruction was not correct, because the point of law comprehended in it was not stated fairly and concisely. The fact that the horse might have been taken by defendant and feloniously converted to his own use in any one of the counties specified in the instruction, within 500 yards of the county of San Benito, was ignored. A fraudulent appropriation of the horse in any of those counties within the 500-yard belt of the county in which the horse had been rightfully received, would have made the defendant guilty, and he was not entitled to acquittal. So that, instead of modifying the instruction, the Court should have refused it. But in modifying it, the Court, by its words of qualification, must have referred either to the appropriation of the horse within the 500-yard belt between the county of San Benito and any of the outside counties specified in the original instruction as presented (because the Court had previously fully instructed the jury upon that point,) or to the original taking in the county of San Benito. If to the former, the instruction, as qualified, was not erroneous, if to the latter, it was, like the preceding instruction which the Court refused to give, inapplicable to the evidence in the case, and, for that reason, was not calculated to mislead the jury, and, if erroneous, the error was not prejudicial, for it appears by the record, that the law of the case, as it was submitted to the jury on the evidence, was fairly presented by the Court. By the unchallenged instructions contained in the record, the jury were correctly charged as to what constituted embezzlement, and, also, as to the necessity of finding that the offense, if committed at all, was within the jurisdiction of San Benito County. Two of those instructions given by the Court of its own motion, two given at the request of the defendant, and one at the request of the prosecution, especially directed the jury that if they found that the offense was not committed in the county of San Benito, or within 500 yards of the boundary

line thereof, they must acquit. As an entirety these instructions correctly laid down the law of the case, and the verdict returned by the jury was according to the evidence. That being the case this Court will not set aside the verdict and grant a new trial even if it should find in the record an erroneous instruction, which was not calculated to mislead the jury, and where the jury were bound to find as they did. (*Moffitt vs. Cressler*, 8 Iowa, 122; *State vs. Donovan*, 10 Nev. 36; *Carrington vs. P. M. Co.*, 1 Cal. 475.)

4. For the purpose of proving the appropriation of the horse by the defendant and his movements in the several counties through which he went with it, the District Attorney offered to prove some statements which the defendant had made when testifying as a witness in his own behalf at his preliminary trial before the committing magistrate. To oral evidence of such statements counsel for defendant objected, that they had been reduced to writing in the form of a deposition, and that the deposition was the best evidence. The deposition was then produced and read as evidence, without objection. Yet the admission of the deposition is now assigned as error. An objection to the admission of evidence cannot be made for the first time in an appellate Court. It is a general principle running through all cases that a party must object at the time an act is done, or a ruling made by the Court. If he does not, he will not be heard afterwards to complain. (*King vs. Haney*, 46 Cal. 560; *People vs. Long*, 43 Id. 444; *Livermore vs. Stein*, 43 Id. 274.)

5. The question asked by defendant of the complaining witness was evidently for the purpose of impeachment. But neither time nor place nor person present, was indicated by the question (Sec. 2054, C. C. P.); the objection made to the question was therefore properly sustained. But if the ruling was erroneous it was error without injury, because witness did subsequently answer a like question without objection.

Judgment and orders appealed from affirmed.

We concur: Myrick, J., Ross, J., Morrison, C. J., Sharpstein, J., McKinstry, J.

DEPARTMENT NO. 1.

[Filed November 23, 1882.]

No. 8163.

DUNN, RESPONDENT, vs. DUNN, APPELLANT.

DIVORCE—INTEMPERANCE. Under Section 107 of the Civil Code the "habitual intemperance" mentioned in Section 106 of such Code must continue for one year before it is a ground of divorce.

ID.—FINDING. In this case there is no finding to that effect.

Appeal from Superior Court, Placer County.

Fulweiler and Prewitt, for appellant.

Vineyard, Hamilton, Hale & Craig, for respondent.

By the COURT:

The ground relied on by the plaintiff for divorce was the alleged habitual intemperance of the defendant. Section 106 of the Civil Code declares that "habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party;" and the following section declares that such intemperance must continue for one year before it is a ground for divorce. There is in the case before us no finding that the habitual intemperance of which the defendant was found guilty had continued for the period of one year, for which reason we are bound to remand the cause.

Judgment reversed and cause remanded for a new trial.

DEPARTMENT No. 1.

[Filed November 22, 1882.]

No. 7324.

HANLEY, APPELLANT, VS. KELLY ET AL., RESPONDENTS.

EQUITY—TRUST—ESTOPPEL—ACTION—HOMESTEAD—ELECTION. The amended complaint showed in substance that in 1873 a judgment had been rendered in favor of plaintiff against the defendant James Kelly, which judgment established a trust in favor of plaintiff as to certain money deposited in 1865, payable on demand; demand was made in 1872; defendant refused to pay, etc.; the money was invested as part payment of a homestead; and the prayer was that defendant be adjudged to hold such portion of the homestead premises in trust for plaintiff as the trust money bears to the whole purchase money of the homestead lot, etc. The allegation with reference to the investment of the trust moneys by defendant, James Kelly, in the lot of land, is: "That whilst said trust money has been so as aforesaid in the hands of the said James Kelly, he, the said James Kelly, has invested the same," etc. *Held*, For aught that appears, the investment was made with full knowledge on the part of plaintiff before the action was brought to recover the amount deposited, with interest, which resulted in the judgment at law, and facts are alleged showing that plaintiff had complete information with respect to the amount and condition of the trust fund. Under such circumstances plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead.

Appeal from Superior Court, San Francisco.

Heinlein and Soderberg, for appellant.

E. A. Lawrence, for respondents.

By the COURT:

The demurrer to the third amended complaint was properly sustained.

The allegation with reference to the investment of the trust moneys, by defendant, James Kelly, in the lot of land described, is: "That whilst said trust money has been so as aforesaid in the hands of the said James Kelly, he, the said James Kelly, has invested the same," etc. For aught that appears, the investment was made with full knowledge on the part of plaintiff before the action was brought to recover the amount deposited, with interest, which resulted in the judgment at law, and facts are alleged showing that plaintiff had complete information with respect to the amount and condition of the trust fund.

Under such circumstances, plaintiff must be held to have elected his remedy at law, and to be estopped from pursuung in equity the fund into the homestead. (Sec. 2, Story's Eq. Juris. 1097; *Dash vs. Van Kleeck*, 7 Johns. 497; *Wells, Fargo & Co. vs. Robinson*, 13 Cal. 141.)

Judgment affirmed.

IN BANK.

[Filed November 28, 1882.]

No. 7469.

TOWN OF WOODLAND, APPELLANT,

VS.

STEPHENS ET AL., RESPONDENTS.

WATER—CONSTITUTION—CASE FOLLOWED. *People vs. Stephens*, 7469 (November 28, 1882,) followed.

Appeal from Superior Court, Yolo County.

Wilson and Treadwell, for appellant.

Edgerton, Sprague, and Craig & Grant, for respondents.

By the COURT:

On the authority of *People vs. Stephens*, No. 8023, order dissolving injunction affirmed.

DEPARTMENT No. 1.

[Filed November 23, 1882.]

No. 8743.

MENZIES AND McLANE, PETITIONERS,

VS.

DICK AND OTHERS, THE BOARD OF EQUALIZA-
TION, RESPONDENTS.

REVIEW. Application for a writ of review denied, the petition showing no sufficient reason why the application should not have been made to the Superior Court. (Rule 28.)

Lloyd & Wood, for petitioners.

By the COURT:

The application for a writ of review is denied, the petition showing no sufficient reason why the application should not have been made to the Superior Court.

Abstracts of Recent Decisions.

JOINT TORTFEASORS—JOINT NEGLIGENCE. If an injury is caused by the combined acts or negligence of two corporations, a joint action may be maintained for the entire injury against both. (*Bryant vs. Bigelow Carpet Co. et al.*, 7 Am. and Eng. R. R. Cas. 72 (131 Mass. 491).)

New Law Publications.

AMERICAN AND ENGLISH RAILROAD CASES, Vol. VI, and Part 1, Vol. VII.

AM. LAW REGISTER for October.

BUMP ON FRAUDULENT CONVEYANCES, Third Edition, Cushings & Bailey, Publishers, Baltimore.

This work is so well known that comment is unnecessary. This edition brings down the citation of cases to the present year.

Pacific Coast Law Journal.

VOL. X.

DECEMBER 9, 1882.

No. 16.

Current Topics.

E. L. WHIPPLE.

In Santa Rosa, on the 8th of this month, E. L. Whipple, a member of the law firm of Henley, Whipple & Oates, died. We write the above with sorrow and pain. In his death California has lost a valuable citizen, the bar one of its brightest lights, and society one of its most cultured members. As a lawyer Mr. Whipple had already made his mark, and gave promise of distinguished success. As a speaker upon the stump and in the halls of Legislature he was noted for force and brilliancy. As a man he was recognized as loyal, honest and brave. Possessing a fine voice, a commanding presence, and a fertile imagination, he won for himself in the Assembly of 1881, and in the San Jose convention, a reputation for eloquence rare in one so young.

We think no greater proof of the truth of all this could be desired than the following tribute from Judge Temple:

"Of all men whom I have known in my life, I think I may safely say Mr. Whipple, more than any other, impressed me with the idea of permanence. His physique, apparently faultless; his manner, graceful and attractive; his qualities of mind, equally evincing qualities which would endure. Of course, I need not say to members of the bar that in the various duties of an attorney, as in, perhaps, no other calling, a man's abilities and powers are taxed in every direction to the uttermost, his principles strained to the utmost tension, and his temper, also, severely tried in all directions. I know of no respect in which Mr. Whipple has failed. He came to us young and inexperienced, and it may almost be said, without effort he vaulted and took rank at once with the highest. In carrying out the thought which I expressed of permanence, I have never doubted since I became acquainted with him—I am sure no member of the bar here has doubted—that his career was to be a distinguished one. I knew it would be so—every one knew

it would be "so—and, as has been intimated by one of the brethren of the bar who has spoken, it is the highest meed of praise he could have, that during his sickness this community has been more universally and profoundly moved than on any other such occasion that has come under my observation or within my memory. Since I have lived in the county, more than twenty members of the bar have been carried to the grave out of our small body: some ripe with honors, covered with laurels; some whom the community loved and whose memory we still cherish; and yet I think it is no disparagement to any to say that the death of no one has so profoundly moved this community as the death of Mr. Whipple. Sorrow has never been so universal, and at the same time so profound. Doubtless the personal attractions of Mr. Whipple had much to do with this, and I think, perhaps, still more the impression that a brilliant and useful career has been most untimely terminated."

LEX FORI—LEX LOCI SOLUTIONIS—LEX LOCI CONTRACTUS.

The Supreme Court of the United States, in *Pritchard vs. Norton*, 5 Morrison's Transcript, 115, discusses very fully the application of the *lex fori* and of the *lex solutionis*, and of the *lex loci contractus*. The question before the Court arose as follows: A bond of indemnity had been executed in New York, payable generally, to indemnify one who had become a surety upon an appeal bond given in the Supreme Court of Louisiana, and who had become liable as such surety. Suit was brought upon this bond in the United States Circuit Court for Louisiana, and the defense of "no consideration" was set up, a defense, under the statute of facts, good by the laws of New York, but not by the laws of Louisiana, it being claimed that New York was the *locus contractus*, because the bond was executed there, delivered there, and (no other plan of performance being designated) was to be performed there. In opposition to this it was claimed that the law of Louisiana should control, because it was the *lex fori* and also the *lex loci solutionis*, the obligation of the bond being to repay the surety in the appeal bond the amount of his advance in the place where he was bound to discharge his own liability, to wit, in Louisiana. The Court distinguished between the *lex fori* and *lex solutionis*, the former never affecting the merits or substance of the contract, the latter being really the law of the contract, and held that "the question of consideration is not one of procedure or remedy, but goes to the substance of the right itself, and belongs to the constitution of the contract," and therefore decided that the law of Louisiana must control, not because it was the law of the forum, but because it was the contract, the *lex solutionis*; that the contract, although made in New York, must be construed as one to be performed in Louisiana.

Supreme Court of California.

IN BANK.

[Filed November 17, 1882.]

No. 7595.

THE NEVADA BANK OF SAN FRANCISCO,
PETITIONER,

VS.

CHARLES STEINMETZ, TREASURER OF THE COUNTY OF
SANTA CRUZ, RESPONDENT.

SUBSIDY—RAILROADS—CONTRACT—SUPERVISORS—BONDS—INTEREST. Application for a writ of mandamus, requiring respondent, as Treasurer of the county of Santa Cruz, to pay interest upon certain bonds of the county, issued in aid of the construction of a railroad therein, under the Act of April 4, 1870, "to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties." (Stats. 1870-4, p. 746.) Payment was resisted on the grounds that the contract was an unilateral one, and therefore not binding on the county; that the Board of Supervisors had no power to enter into a contract for the construction of a railroad which did not extend over the entire route voted on; and that the Act of April 4, 1870, was repealed before the bonds were issued. (Stats. 1873-4, p. 26.) *Held*: Petitioner, a *bona fide* holder, was entitled to the writ. (Myrick, J., McKee, J., and Thornton, J., dissenting.)

Mandamus.

McAllister & Bergin, for petitioner.

J. H. Skirm, for respondent.

MORRISON, C. J., delivered the opinion:

By the Act approved April 4, 1870, the Legislature authorized the several counties of this State to aid (under certain conditions and qualifications) in the construction of railroads by the issue of county bonds payable within twenty years, and bearing interest not to exceed 7 per cent. per annum. The second section of the Act provides that before the granting of such aid the Board of Supervisors of the county proposing to grant such aid shall submit to the qualified electors thereof the question whether such railroad aid shall be granted, and directs that a notice of the election as therein provided for shall be given. It further provides that no such aid shall be granted "unless a majority of the electors voting at such election shall cast their votes in

favor of such aid." In pursuance of the provisions of the Act referred to, the Board of Supervisors of the county of Santa Cruz, at a regular meeting held on the twenty-fifth day of September, 1872, passed and duly entered in its minutes the following order:

"Whereas, the Board of Supervisors of Santa Cruz County, State of California, propose that said county shall aid in the construction of a railroad of not less than a three-foot gauge, and beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in a most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey, and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's Ranch, by the issue of county bonds, payable within twenty years, and bearing interest, payable semi-annually, at the rate of seven (7) per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding in the aggregate the sum of two hundred and forty thousand dollars, such aid to be in lieu of the aid of one hundred thousand dollars, heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad; and, whereas, the Santa Cruz and Watsonville Railroad Company have agreed that the contract entered into by said company with the said county, dated January 18, 1872, and entered on the records of said Board, in vol. 3, p. 184, and following, shall be deemed canceled in case the railroad aid herein proposed shall be granted. Now, therefore, it is ordered, and notice is hereby given, that at the next general election, to be held on the fifth day of November, 1872, there shall be submitted to the electors of Santa Cruz County the question whether the Board of Supervisors of Santa Cruz County, in lieu of the aid of one hundred thousand dollars, heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad Company, at or near the town of Watsonville, and upon the cancellation of the said contract of the said county with the Santa Cruz and Watsonville Railroad Company, shall be authorized to grant, upon terms which may appear to them advantageous to the county, the aid of the county of Santa Cruz in the construction of a railroad of not less than a three-foot gauge, on the route hereinbefore described, to an amount of not exceeding in the aggregate

the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz County, as proposed by said Board, to be issued at the rate of not more than six thousand dollars per mile, for every mile of main track actually constructed; all ballots cast in favor of said proposition shall contain the words, 'Railroad Aid, Yes;' all ballots cast against said proposition shall contain the words, 'Railroad Aid, No.' Said election shall be held in all the election precincts in said county, * * * which order was published for the period of thirty days in two newspapers printed and published in the county of Santa Cruz, in accordance with such notice."

On the fifth day of November, 1872, a general election was held in the county of Santa Cruz, and at such election a majority of the electors voting cast their votes in favor of granting aid to the railroad mentioned in said order, and on the eleventh day of that month the Board of Supervisors, after canvassing the votes, published and declared that a majority of the electors voting at such election cast their votes in favor of granting the railroad aid mentioned in said order, and thereupon caused the proper record thereof to be entered in the "Minute Book" of its proceedings. On the fifteenth day of June, 1873, the Board of Directors of the Santa Cruz Railroad Company (the same being a corporation duly organized and existing under the laws of this State) passed a resolution authorizing the President of the company to apply to the Board of Supervisors for aid in the construction of its road at the rate of six thousand dollars per mile in county bonds, and on the fourth day of August, 1873, the Board of Supervisors of the county of Santa Cruz and the Santa Cruz Railroad Company executed the following agreement:

"This contract, made and entered into on the fourth day of August, A. D. 1873, by and between the county of Santa Cruz, in the State of California, acting by and through the Board of Supervisors of said county, as the party of the first part, and that certain corporation, organized, acting and existing under and by virtue of the laws of said State, and known, designated, and called the Santa Cruz Railroad Company, as the party of the second part:

"Witnesseth, that the Board of Supervisors of said county, having, by an order duly made on September 25, 1872, and recorded at large in volume 3, pages 236-7-8 of the minutes of the proceedings of said Board, proposed that said county shall aid in the construction of a railroad of not less than a three-foot gauge, the route of which road is

definitely described in said proceedings as beginning at or near the Pajaro depot, on the Southern Pacific Railroad; thence running in the most practicably direct route through the counties of Monterey and Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey; and thence along or near the coast to the boundary of said county near the southeast corner of the Point New Year's Rancho, by the issue of county bonds, payable within twenty years, and bearing interest, payable semi-annually, at the rate of seven per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding, in the aggregate, the sum of two hundred and forty thousand dollars; such aid to be in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad; and the Board of Supervisors of said county, under and in pursuance of an Act of the Legislature of said State, approved April 4, 1870, and entitled, 'An Act to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties,' and of the Act of April 4, A. D. 1870, supplemental thereto, having, at the election held in said county on the fifth day of November, A. D. 1872, of which election at least thirty days' notice was given by publication once a week in a newspaper printed and published in said county, which notice stated the day on which, and the places where, such election was to be held in said county, and the amount of bonds of said county to be issued for railroad aid, and definitely described the route of the railroad for which aid was proposed, submitted to the qualified electors of said county the question whether such railroad aid shall be granted by said county to aid in the construction of a railroad on the route hereinbefore described; and at such election a majority of the electors voting at such election having cast their votes in favor of such railroad aid, and the result of said election, after a full and fair canvass by said Board, having been declared by said Board to be in favor of granting such railroad aid, and the sum of two hundred and forty thousand dollars, authorized by the said votes as aforesaid, to be granted in and to such railroad, being less than five per cent. of the value of the taxable property of said county, and no aid whatever to any railroad ever having been granted by said county. And a certain agreement, dated January 18, A. D. 1872, between said county and the Board of Supervisors thereof,

and the Santa Cruz and Watsonville Railroad Company, having been fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein. And the said party of the second part having been heretofore duly organized as a corporation under the laws of said State for constructing and maintaining a railroad on the entire route first hereinbefore mentioned and described, and proposing to construct on said route, first, the section of such railroad between a point at or near said Pajaro depot and a point on the westerly side of said San Lorenzo river, and within the corporate limits of the town of Santa Cruz, which point last referred to is hereafter to be located by said party of the second part; and said party of the second part having solicited the said Board to grant the aid of said county in the construction of such railroad, and the terms offered by said party of the second part appearing to said Board to be advantageous to said county, and it appearing that said county will be greatly benefited by the construction of such railroad, or any part thereof; now, therefore, this contract witnesseth, that in consideration of the premises and of the agreements herein named, to be done and performed by said party of the second part, the said party of the first part has agreed, and hereby does agree with said party of the second part, to issue, deliver, and donate unto said party of the second part, in aid of the construction of such railroad, bonds of the said county of Santa Cruz, in amounts and at the times, and upon the terms as herein stated; said bonds, as herein provided, shall be payable in gold coin to said party of the second part and to the holders of such bonds within twenty years from the date of their issue, at the office of the Treasurer of said county, and shall bear interest in like coin at the rate of seven per cent. per annum, and the installments of interest shall be payable semi-annually on the first Mondays of January and July of each year, on coupons to be issued and delivered with such bonds, and each of such bonds shall be of the denomination of not less than \$100 nor more than \$1,000, signed by the Chairman of said Board and by the Treasurer and Clerk of said county and under the seal of said county, the interest coupons to be signed by the Treasurer and Clerk of said county. Such bonds are prepared for signing in the following form, to wit: Number ——. State of California. — Dollars. Bond of the county of Santa Cruz," etc., etc.

The contract further provides that when five miles of the road are completed and a construction train has been run

over the same, there shall be issued to the company bonds of the county to the amount of \$30,000, and upon the construction of every mile of the track thereafter and the passage of a construction train over the same, there shall be issued to the railroad company bonds of the county to the amount of \$6,000. The contract then proceeds to provide for a notice to be given of the construction of the road as it progressed, for an examination and inspection of the same, for an acceptance thereof by the county, and for the issue of bonds as the road was built, at the rate of \$6,000 per mile. There are numerous other clauses in the contract which it is unnecessary to notice for the purposes of this opinion.

It appears from the evidence in the case that the railroad company commenced work on the first section of its road and prosecuted the work thereon with reasonable diligence until the same was completed from the city of Santa Cruz to the Pajaro depot; that the company built a bridge over and across the San Lorenzo river; that the road was constructed in the manner provided for and in accordance with the contract; that a construction train was run over the road; that it was inspected by the Board of Supervisors; that it was duly accepted, and the Board of Supervisors, on the ninth day of December, 1874, ordered that \$30,000 of the bonds of the county be issued to the company.

It further appears that on or about the eleventh day of December, 1874, a suit was commenced by one William H. Patterson, in the District Court of the Twentieth Judicial District, against the Board of Supervisors of the county of Santa Cruz, praying for an injunction to restrain and enjoin the defendants from issuing to the railroad company any bonds on account of the construction of said road, and thereupon an injunction was issued in pursuance of the prayer of the complaint. The case of *Patterson vs. The Supervisors* was afterwards tried upon its merits, and on the twenty-third day of February, 1876, a decree was entered therein declaring that the proceedings of the Board were legal and valid; that the issuance of the bonds should not be in any manner restrained or enjoined, and thereupon the injunction previously issued was dissolved.

After the judgment of the Twentieth District Court dissolving the injunction referred to above, that is to say, on or about the twenty-fifth day of February, 1876, the Board of Supervisors of Santa Cruz County issued and delivered to the Santa Cruz Railroad Company \$30,000 of bonds, each of which was in the following form.

"In pursuance of an Act of the Legislature of the State of California, entitled 'An Act to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties,' approved April 4, 1870, and of an Act supplemental thereto, approved April 4, 1870, and in accordance with the terms of a contract entered into by the Board of Supervisors of said county on the fourth of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the Board of Supervisors in volume 3, pages 279, 280, 281, 282, 283, 284, 285, 286:

"The county of Santa Cruz owes and will pay at the office of the County Treasurer in the town of Santa Cruz, State of California, to the Santa Cruz Railroad Company, or the holder of this bond, within twenty years from the date of these presents, the sum of one thousand dollars in U. S. gold coin, with interest thereon at the rate of seven per cent. per annum in like gold coin, from the date hereof until paid; interest payable semi-annually on the first Mondays of January and July of each year, on the surrender to said County Treasurer of the coupon for said interest."

The coupon attached to each of the bonds is in the following form:

"Coupon No. 41. On the 23d of February, A. D. 1896, the county of Santa Cruz will pay to the Santa Cruz Railroad Company, or bearer, at the County Treasurer's office, ten and twenty-one one hundredths dollars in U. S. gold coin, interest due on Bond No. 1."

On the twentieth day of March, 1875, and at divers times between that date and the fifteenth day of November of that year, the Santa Cruz Railroad Company presented and filed with the Board of Supervisors written notices and communications informing them of the completion of fourteen additional miles of the road, and thereupon proceedings were regularly taken by the Board to inspect and examine the same, and after such examination and inspection, the following order was passed:

"It is therefore ordered by the Board of Supervisors of the county of Santa Cruz, that there be issued and delivered to the Santa Cruz Railroad Company, bonds of said county of Santa Cruz, to the amount of eighty-four thousand dollars, in sums of one thousand dollars each, payable within twenty years of their date in United States gold coin, and bearing interest in like coin, at the rate of seven per cent. per annum from their date, and interest payable semi-annually on the first Mondays of January and July of each

year, in pursuance of the terms of said contract between the county of Santa Cruz and the Santa Cruz Railroad Company, and that said bonds be signed by the chairman of this Board and by the County Treasurer and County Clerk, and under the seal of said county, and the interest coupons to be signed by said Treasurer and said Clerk.

"It is further ordered, that each of the bonds issued to the said railroad company under said contract, shall be of the denomination of one thousand dollars."

In pursuance of the above order bonds were issued to the Santa Cruz Railroad Company to the amount of \$84,000. These bonds were in form similar to the bonds for \$30,000 previously issued to the railroad company.

All of these bonds were, within three months from the issuance thereof, sold and disposed of by the railroad company, and on the second day of August, 1879, they were purchased and paid for by the plaintiff, the Nevada Bank of San Francisco, in the ordinary course of business, at the rate of ninety-five cents on the dollar, and were purchased under the belief that the same were legal and valid.

On the third day of January, 1881, the coupons on the bonds which fell due on the first of that month were presented to the defendant, the Treasurer of the county of Santa Cruz, and payment thereof was demanded, which was refused by the defendant, although he at that time had sufficient funds on hand specially provided by law for that purpose, to pay said coupons; and this is an application to the Court for a peremptory writ of mandamus to compel the defendant as Treasurer of said county to pay such coupons.

There are other facts presented by the pleadings and report of the referee to whom this case was referred for the purpose of taking and reporting the facts therein, but we deem it unnecessary to consider them.

The question presented for our decision is simply this: Are the bonds in the hands of the plaintiff, claiming the same as a *bona fide* purchaser for value, valid and binding upon the county of Santa Cruz?

The Act of April 4, 1870, as appears from its title, as well as from its clearly expressed object, was intended to "empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties," and the only restrictions imposed upon the Board were that the bonds to be issued for such aid should not exceed five per cent. of the value of the taxable property of the county; and further, that the question of granting such aid should be submitted to the qualified

electors of the county, in pursuance of Section 2 of the Act. The question of granting such aid was submitted to the voters of the county of Santa Cruz, and the proposition was for a road "beginning at or near Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river, near Watsonville, between the county road leading to Soquel and the bay of Monterey, and thence running along or near the coast to the boundary of said county, near the southeast corner of Point New Year's Ranch," and the order was:

"Now, therefore, it is ordered, and notice is hereby given, that at the next general election to be held, etc., there shall be submitted to the people the question whether the Board of Supervisors shall be authorized to grant, upon terms which may appear to them to be advantageous to the county, the aid of the county of Santa Cruz, as follows: When five miles of said first section of said railroad shall have been constructed, and a construction train run over the same, there shall be issued and delivered to said party of the second part by the said party of the first part, bonds of said county to the amount of \$30,000, and upon the construction of every mile of track thereafter of such railroad, and the passage of a construction train over the same, there shall be issued and delivered as last aforesaid, to the said party of the second part, bonds of said county to the amount of \$6,000, and so on until the construction of said railroad is completed;" and it was provided in the proposition submitted to, and adopted by the vote of the people, that bonds should be issued at the rate of not more than \$6,000 *for every mile of main track actually constructed*. It is claimed on behalf of defendant, first, that the contract was an unilateral one, and therefore not binding upon the county; second, that the Board of Supervisors had no power to enter into a contract for the construction of a railroad which did not extend over the entire route, from Pajaro depot on the south to Point New Year's Ranch on the north; and third, that the Act of 1879 was repealed before the bonds were issued.

If the contract did not contain any stipulation on the part of the railroad company to build the road or to do any other act, we can see no good reason why the party of the first part should not be bound by its promise or agreement, provided the railroad company, acting upon such promise or agreement, proceeded to construct the road in accordance with the conditions set forth in the contract. It may be that the county could have withdrawn its promise of aid at any time

before work was done on the faith of the promise; but after the work was done and the contract was executed, the county could not escape from its liability on the ground that the company did not, in the first instance, obligate itself to construct the road. If A promise B to pay him a stipulated sum for a certain service, and B renders the service without any contemporaneous promise to do so, can it be doubted that A will be bound by his promise? The following authorities are referred to in support of the point that the contract was binding on the county after performance by the Company, *even if it was unilateral*: *Barnes vs. Perine*, 3 Barb. 211; *Robertson vs. Marsh*, 3 Scam. 198; *Chitty on Contracts*, 64; *Train vs. Gold*, 5 Pick. 879; *White vs. Baxter*, 71 N. Y. 254.

But is it true that the railroad company did not agree or promise to do anything on its part? The contract contains the following agreement or promise by the company: "And the said party of the second part (the company) has agreed and hereby does agree to and with the said party of the first part to build, construct and finish such last-named bridge (across the San Lorenzo river), and to lay the track of said railroad from the easterly bank of said last-named river to a point on the westerly side thereof, within three hundred feet of said bay, in three months after said bonds of said county, to the amount of \$90,000, shall have been issued and delivered to said party of the second part." There is also a clause in the contract to the effect that the aid is granted in lieu of a former aid of \$100,000, which is surrendered and canceled by the express terms of the contract. Here we find a sufficient consideration, if any were necessary, for the promise on the part of the county.

The second point made on behalf of the defendant involves an attack upon the contract, on the ground that the Board of Supervisors had no power to make it, because it did not provide for, and the Santa Cruz Railroad Company was not bound under it to construct the road *along the entire route*.

In this connection it is proper to notice the fact that the Act of April 4, 1870, does not provide for a contract between the county and the railroad company, but simply empowers the county to aid in the construction of railroads upon certain terms. The aid authorized by the law, and intended by the parties, was to be granted as the work progressed, in order to assist and enable the company to pay for the work and construct the road, and it never was contemplated that the entire work should be completed and paid for by the company before the bonds should be issued. (*Kennicott vs.*

Suprs., 16 Wall. 466.) This would not be aiding the company in the construction of the road, but would be simply reimbursing the company, in whole or in part, its money expended in building the road. This view is fortified by the proposition submitted to the electors, which was that the county should aid the railroad company in the construction of its road by issuing and delivering to it bonds "*at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed.*" The bonds should have been issued for every mile when constructed (after the completion of the first five miles), and it is fair to presume that they would have been so issued if the Board had not been enjoined by the order of the Twentieth District Court.

The Bank of Nevada purchased the bonds for value, without notice of any infirmity in them, and the only question is one of power in the Board to issue them. (*Cromwell vs. The County of Sac.*, 96 U. S. 51; 1 Dillon Mun. Corp., Sec. 515, and authorities there cited.) If the Board did not have the power to issue the bonds there could be no such thing as a *bona fide* holder of them, as any purchaser would be held to have notice of the fact that there was a total want of authority." (*Township of East Oakland vs. Skinner*, 94 U. S. 258.) "The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper." (1 Dillon on Mun. Corp., Sec. 113, and authorities there cited.) Speaking further on this subject the same author says: "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation." (Id. 513.) "It" (the Supreme Court of the United States) "has adopted, when necessary to protect the *bona fide* holders of such securities, liberal construction of statutes and charters authorizing the creation of such debts. Against such holders it has given no favor to defenses based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to issue them." (Id. 515.)

It is claimed in the case now under consideration that there was a want of power on the part of the Board of Supervisors to make any contract or to issue any bonds for a portion of the road; and that is the only ground upon which the

question of power can arise. There is no charge of fraud or unfair dealing on the part of the Board, and the most that can be said against its action is that it provided in the first place for the construction of that section of the road lying between the city of Santa Cruz and the Pajaro depot. In this we can see no just cause of objection or complaint, for that was the most important section of the road; and its completion brought a large portion of the county of Santa Cruz into direct communication with the Southern Pacific road, and thereby opened a lengthy line of travel north and south with other portions of the State.

It does not appear that there was not an intention on the part of the Board of Supervisors to extend the road in a northerly direction from Santa Cruz to its northerly terminus; and after appropriating one-half of the \$240,000 of the bonds to the first section of the road—about one-half of the entire route—there remained to be issued a corresponding amount of bonds to aid in the construction of the other half of the railroad.

It remains only for us to say that in our opinion the bonds were not issued without power; that they were valid when issued, and are good and binding upon the county in the hands of the plaintiff.

There is but one other question to be determined, and that relates to the effect of the Act of January 14, 1874, repealing the Act of April 4, 1870. This question has been passed upon in several cases. It is found in the report of the referee that the Santa Cruz Railroad Company commenced work on its road, under the contract between it and the county, on the 25th day of October, 1873, and prosecuted the same with reasonable diligence; but the repealing Act was not passed until January 14, 1874. In view of the facts of this case the validity of the bonds was not affected by the repeal of the Act of April 4, 1870. (*Town of Concord vs. Savings Bank*, 92 U. S. 630; *Steamship Company vs. Joliffe*, 2 Wallace, 450; *Montgomery vs. Casson*, 16 Cal. 189.)

Let the writ issue.

CONCURRING OPINIONS.

The only objection to the validity of the bonds which seems to us to merit any serious consideration is, that after a majority of the electors voting upon the proposition to issue bonds to aid in the construction of a railroad upon a certain specified route, between two certain specified points, had voted in favor of granting such aid, the Board of Supervisors entered into an agreement whereby said Board agreed to

issue bonds to the amount of six thousand dollars per mile for the construction of a railroad on said route for a distance less than the entire distance between the termini mentioned in the proposition submitted to said electors. And that objection is founded upon the hypothesis that it was the understanding of the electors who voted upon the proposition that in consideration of the aid granted the entire road should be constructed.

There is but one way at which we can arrive at the intention of the electors who voted upon the proposition to grant aid, and that is by an inspection of the proposition itself.

The proposition voted upon, as stated in the notice of the election, was substantially as follows: That the Board of Supervisors should be authorized to grant (in lieu of the aid of one hundred thousand dollars, previously authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad) *upon terms which might appear to said Board advantageous to said county*, "in the construction of a railroad *on the route*" described as "beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey, and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's Ranch," * * "to an amount of not exceeding in the aggregate the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz County, as proposed by said Board, to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed."

The vote was in favor of aiding in the construction of a railroad on a route "beginning at or near Pajaro depot," and "ending at the boundary of said county, near the southeast corner of the Point New Year's Ranch. And the Board of Supervisors were authorized "to grant upon terms which to them" might "appear advantageous to the county" the aid of the county in the construction of a railroad on that route, in the bonds of the county, "to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed," until the aggregate of the bonds so issued should amount to \$240,000.

Now it is not claimed that so much of the road as has been actually constructed was not constructed on the route

designated in the proposition which was submitted to the electors of the county. But it is claimed that the Board of Supervisors was not authorized to agree to issue bonds at the rate of six thousand dollars per mile for any number of miles less than the whole number between the terminal point of the route. The Board, however, was expressly authorized to grant said aid upon terms which might appear to it to be advantageous to the county, and if it appeared to it to be advantageous to the county to aid in the construction of nineteen miles, and no more, of the road constructed on the route designated, it is not the province of this Court to review the decision of the Board upon that question. We are bound to assume that it appeared to the Board to be advantageous to the county to have no more than nineteen miles of that road constructed, at an expense of six thousand dollars per mile to the county, until we are convinced that it appeared otherwise to said Board.

The Board was not bound to issue bonds at the rate of six thousand dollars per mile for every mile of railroad which might be constructed between terminal points mentioned in the proposition to grant aid. But it was authorized to issue them at the rate of six thousand dollars per mile for every mile of main track actually constructed. And whether it issued them at the rate of six thousand dollars per mile for a part of the distance or for the entire distance, it was issuing them in aid of the construction of a railroad on the route designated in the proposition upon which the electors had voted. By aiding in the construction of nineteen miles of railroad on the route designated, the county was aiding *pro tanto* in the construction of it from one to the other of the terminal points mentioned in said proposition. If it was the intention of the electors voting upon the proposition to grant the aid of the county in the construction of a railroad upon the route specified, that said aid should not be granted except upon the condition that a railroad should be constructed the entire length of the route, it must be admitted, we think, that they have failed to express that intention. And if they have, it is no part of the duty of this Court to supply the omission. It is our duty to construe the contract which the parties have made—not to make one for them.

The construction which we have put upon the vote of a majority of the electors who voted upon the proposition to issue bonds in aid of the construction of said railroad is in accord with that which the Board of Supervisors practically put upon that vote; and the people of said county acquiesced in that construction for a considerable period of time, by offering no resistance to the issuing of the bonds, and by

paying the interest upon them semi-annually for a period of more than four years, three of which preceded the purchase of said bonds by the petitioner herein. It is not necessary to invoke the doctrine of "municipal decision," or of estoppel, of which it is one of the forms, to the extent that it has been applied by the Supreme Court of the United States in cases involving the validity of municipal bonds, in order to sustain the validity of these bonds. In a late treatise on Public Securities the author says: "It has often happened in the cases which have come before the Supreme Court of the United States that the municipalities which sought to evade the force of the bonds issued on their behalf had received the proceeds of the bonds, enjoyed the benefits of the improvements made by them, paid the interest for many years, and these circumstances as well as the doctrine of municipal decision, have influenced the Court in their determinations." And then adds: "It is not, however, against these decisions, when these different elements are combined, that we make our protest." (Burroughs on Public Securities, p. 341.) In addition to those enumerated in the above extract, there is in this case another very important element, and that is that it was made a condition precedent to the issuing of any bonds to aid in the construction of said railroad, that a certain contract by which said county had agreed with the Santa Cruz and Watsonville Railroad Company to aid it to the extent of one hundred thousand dollars "in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad, at or near the town of Watsonville," should be canceled; and it appears by a recital in the agreement between the Board of Supervisors and the Santa Cruz Railroad Company, that said contract with the Santa Cruz and Watsonville Railroad Company was "fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein." That liability amounted to within \$14,000 of the whole amount of the bonds held by the petitioner. And it is not even suggested that the liability so canceled can be restored so as to place the parties in the same condition that they were in prior to its cancellation. Does not that present a case for the application of the principle of estoppel?

If that principle can be applied to a municipality, it is difficult to conceive of a case to which it could be applied more properly than to the one at bar. Here a majority of the electors voted in favor of a proposition which will at least admit of the construction which all of the parties interested in it practically put upon it for a period of four or five years by issuing the bonds and paying interest

thereon, and now, after said bonds, which are negotiable, have passed through several hands, this Court is asked to hold that such construction was erroneous, and that the petitioner, who paid their full market value, should have made that discovery before purchasing them, although it does not appear that any tax-payer, Supervisor, Treasurer, or legal adviser of the county made it until some time afterward.

That which it is now claimed constituted a condition precedent to the power to issue the bonds is certainly not clearly expressed in the proposition submitted to the electors, and for which a majority of them voted, and it seems to us inexplicable that if such a condition had been supposed to exist, the Board of Supervisors should have been permitted to issue the bonds in utter disregard of it, when any tax-payer in behalf of himself and all other tax-payers of the county, could have intervened and prevented the issue of them. And it is still more inexplicable to us that under such circumstances the interest on the bonds should have been paid for a period of four or five years without a word of protest from any tax-payer, so far as we are advised. "They had opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin the proceeding and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons, who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so as against innocent third persons. They are concluded not simply by the acts of their public agents but their own." (*State vs. Van Horne*, 7 Ohio St. 327.)

If the construction of the power conferred upon the Board of Supervisors, for whom the respondent contends was clearly the correct one, we might be compelled to hold that the petitioner was chargeable with notice of the want of authority in the Board of Supervisors to enter into the agreement which they entered into with the railroad company. But it is by no means clear that that construction is the correct one, and it is clear that during a period of four or five years all parties interested acted as if it was not the correct one, and we think that in a case like this, that circumstance is entitled to great weight.

SHARPSTEIN, J.

I concur: McKinstry, J.

I concur upon the second ground discussed in the opinion of Mr. Justice Sharpstein and for the reasons by him given.

ROSS, J.

DISSENTING OPINION.

Under the Act of April 4, 1870 (Stats. 1869-70, p. 746,) a vote was had, authorizing the granting of aid, and a contract had been made between the Board of Supervisors of Santa Cruz and the Santa Cruz and Watsonville Railroad Company, by which aid to the amount of \$100,000 was granted to that company to assist in the construction of a railroad from the town of Watsonville to the town of Santa Cruz. For some reason the work did not progress. On the twenty-fifth of September, 1872, the Board of Supervisors made an order for an election, to be held upon the proposition of granting aid for the construction of a railroad from a point on the line of the Southern Pacific Railroad, at or near the Pajaro depot, thence through the county of Santa Cruz to the northern line of the county, near Point New Year's Ranch; said aid to be \$6,000 per mile, and not exceeding the aggregate of \$240,000, interest bearing bonds of the county to be issued therefor; said aid to be in lieu of the aid of \$100,000 theretofore authorized to be granted. In pursuance of this order an election was held, and the result was in favor of the proposition.

Thereafter, on the fifteenth of June, 1873, the Santa Cruz Railroad Company made its application for aid. On the eighteenth of June, 1873, the articles of incorporation of the Santa Cruz Railroad Company were filed, such incorporation being for the purpose of constructing, conducting, and maintaining an iron railroad within the counties of Monterey and Santa Cruz, commencing at a point at or near Pajaro Station, on the Southern Pacific Railroad, in the county of Monterey, and running thence to and through the county of Santa Cruz to the northern boundary of Santa Cruz County at or near the south boundary of the Rancho Point Año Nuevo (Point New Year's Ranch,) the estimated length of said railroad being forty miles. On the fourth of August, 1873, the Board of Supervisors received from the Santa Cruz and Watsonville Railroad Company a release of the \$100,000 aid, and on the same day executed a contract with the Santa Cruz Railroad Company, in which was recited the before-mentioned proposition for aid in the construction of a railroad beginning at or near the Pajaro depot, and hence running in the most practicable direct route through the counties of Monterey and Santa Cruz, to the boundary of Santa Cruz County, near the southeast corner of the Point New Year's Rancho, by the issuance of bonds, the same to be in lieu of the \$100,000 before authorized; the submission

of the proposition to the voters of the county; the election and the vote in favor of the aid; the release of the \$100,000 aid; the incorporation of the Santa Cruz Railroad Company for the purpose of constructing and maintaining a railroad on the entire route, and the solicitation of the company for aid in the construction of such railroad. The contract then proceeded to declare that the county would be greatly benefited by the construction of said railroad *or any part thereof*, and provided for the issuance of bonds at the rate of \$6,000 per mile as the road should be completed in sections specified; but provided that the western terminus of the work to be done thereunder should be at a point within the corporate limits of the town of Santa Cruz. The company was authorized to commence its work at a point near the town of Santa Cruz, and prosecute the same easterly to Pajaro Station. It should be noticed that the town of Santa Cruz is about midway between the two ends of the road, as stated in the proposition submitted to the voters. No provision was made in this contract for the construction of a road beyond Santa Cruz, nor was any reference made thereto, except by the recitals above stated; on the contrary, it is perfectly evident from the contract that the Board of Supervisors on the one hand, and the railroad company on the other, intended that the same should apply only to that portion of the route as should be between Pajaro and Santa Cruz. The work of construction so progressed that on the seventh of December, 1874, the Board of Supervisors made an order for the issuance of bonds to the amount of \$30,000. At this point one Patterson brought a suit against the Board of Supervisors for the purpose of restraining the issuance of the bonds; and such proceedings were had that on the twenty-third of February, 1875, judgment of nonsuit was entered, upon the ground that the plaintiff had failed to prove a sufficient case.

Thereafter, in 1876, the road having been constructed from Pajaro to Santa Cruz, bonds were issued to the Santa Cruz Railroad Company—\$30,000 on the twenty-fifth of February, and \$84,000 on the eleventh of March. The bonds on their face refer to the Act of 1870, and recite, “and in accordance with the terms of a contract entered into by the Board of Supervisors of said county on the fourth day of August, 1876, with the Santa Cruz R. R. Co., which said contract is entered upon the minutes of the Board of Supervisors in Vol. 3, pages 279, 280, 281, 282, 283, 284, 285, 286.” On the seventh of August, 1879, the plaintiff purchased the bonds through a broker, having no knowledge of the then holder, paying therefor 95 per cent. of the par value.

No road has been constructed over any part of the projected route between the town of Santa Cruz and the northern boundary line of the county, nor has such construction been or attempted to be provided for.

The proceeding is a petition for a writ of mandate requiring the respondent as County Treasurer to pay the coupons on the bonds held by petitioner. The petitioner claims as well that the bonds were properly issued, and are a legal charge upon the county, as that it being a *bona fide* holder for value, payment cannot be disputed.

In our opinion, the question of the rights of *bona fide* holders of bonds does not arise and is not for consideration in this case. The bonds on their face refer to the statute authorizing the granting of county aid, and to the contract between the Board of Supervisors and the railroad company. Therefore, the bonds are as though the statute and the contract were written, word for word, therein. The statute authorized the granting of county aid; the election was held thereunder, and the matter submitted was: Shall aid be granted for the construction of a railroad from Pajaro to the northern line of the county? Upon that question, *and that question only*, the people voted to grant the aid; for that purpose, and for that purpose only, the Board of Supervisors were authorized to issue bonds, there was *no vote* upon the granting of aid for any less distance; the contract was for "one section" only—from Pajaro to Santa Cruz—about one half the entire distance voted upon. It cannot be pretended that it is or has been the intention of the railroad company to complete the road. It is manifest that it was the intention of the parties who conducted the transaction on the part of the Board of Supervisors and the railroad company to take advantage of a vote which had been had for granting aid for the construction of the road for the whole distance, construct the road for only half of the distance, obtain the issuance of bonds for that half, at the rate of \$6,000 per mile (\$120,000 for the twenty miles—that probably being the only profitable part to build or operate)—and then omit to proceed with the further construction. The contract, which, by being referred to, is a part of each and every bond, refers, also, to the vote of the people in favor of aid for the road the *entire distance*—and then, after so referring, assumes to authorize the railroad company to construct but the part, the track-laying to commence at Santa Cruz and extend to Pajaro; no word is written, or act provided for, having in view any other or further construction. Such transactions are not fair dealing; and of such, in this case, holders of the bonds are bound to

take notice. It is a question of *power*. The Board of Supervisors had no power to issue bonds to aid in the construction of any quantity or distance of road less than the whole. It acted under a limited and special power of attorney. Possibly bonds might have been issued for miles as the work progressed, but the holders of such bonds would be under the burden of providing for or requiring the entire construction. The Supreme Court of the United States, in *Township of East Oakland vs. Skinner*, (4 Otto, 258,) says: "We have held that there can be no *bona fide* holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds there can be no such thing as a *bona fide* holding."

As was said above, although there was power to issue bonds in a certain case, viz., for the construction of the entire distance, yet *there was no power* to issue in aid of the construction of a less distance. That it was the intent of the railroad company to build, and of the Board of Supervisors to have built, a part only, is clearly manifest from the proceedings. The Board declared (see contract between the Board and the railroad company): "It appearing that said county will be greatly benefited by the construction of said railroad or any part thereof." The Board had not power to declare any benefit from a part. The people had, by their votes, declared the extent of the line of the road, and the Board had no more power to diminish its length than to increase the amount of aid. The intent to avoid compliance with the law is apparent upon the face of the documents referred to in the bonds; and the purchaser was bound to take notice. The bonds were not like a bill of exchange or promissory note, "a courier without luggage"—but these transactions were tied to them, and could not be shaken off.

The Supreme Court of the United States, in *School District vs. Insurance Co.* (13 Otto, 710,) said: "As the bonds recite that they were issued under this Act [an Act which the Court held not to give authority for issuing the bonds in question], and that the vote was taken under it, we cannot see that power purposed to be exercised under other and very different circumstances, can be invoked to give validity to an Act which is void by the authority under which it professed to be acting."

It has been repeatedly urged that the holders of bonds have innocently invested their money, and should, as inno-

cent holders of public securities, be protected. They are not, however, the only persons to be considered. Tax-payers are equally innocent; tax-payers are not to be subjected to extraordinary burdens, or even ordinary burdens, except by law.

To this case may be applied the language used by Justice Field, concurred in by Chief Justice Waite and Justices Grier and Miller, in dissenting from the judgment of the Court in *Rogers vs. Burlington*, 3 Wall. (U. S.) 668: "In all such cases the mode becomes the measure of the power. * * * This is not a case where the doctrine of estoppel has any application. It is not a case where the purchaser of the bonds was misled by any recitals of conformity to law. Here the statute and the ordinance of the city of Burlington, under which authority to issue the bonds was assumed to exist, are both printed in full in the indorsements upon the bonds; and the ordinance is also referred to on their face. But if this were not so, the case would not be changed, as the statute did not authorize the issue of the bonds. No formality of execution, and no extent of recitals, could give validity to instruments thus issued."

There are even stronger objections against the validity of the bonds involved in the case at bar than those considered in the case above referred to.

The length of time which elapsed after the making of the contract and the issuance of the bonds, before the purchase by petitioner, may not be a controlling consideration, but it is certainly significant in one respect. The contract was made August, 4, 1873, and the bonds were issued in February and March, 1876; the petitioner did not purchase until about three years and a half thereafter, to wit, August 7, 1879. During all that period no step had been taken by the railroad company or the Board of Supervisors for carrying out the will of the people as expressed in granting the aid.

The petitioner is not in a position to say it was not fully advised of all the proceedings. While it had the proposed purchase of the bonds under consideration, it caused to be examined the Act of April 4, 1870, the popular vote upon the question of extending the aid, the contract between the Board of Supervisors and the Santa Cruz Railroad Company, and it had the bonds before it. It also caused to be examined an action then pending by the railroad company against the Board of Supervisors for the further issuance of bonds, which action was being resisted upon the ground, among others, that no vote had been had for the granting of aid for any less distance than the whole.

The writ should be denied

M YRICK, J.

We concur; McKee, J., Thornton, J.

IN BANK.

[Filed November 23, 1882.]

No. 8485.

ESTATE OF HILL.

EXCEPTIONS—ALLOWED CLAIM—ESTATE OF DECEASED PERSON—HEIRS—CONTEST—FINAL SETTLEMENT—ADMINISTRATOR. Application to prove certain facts on which an exception was reserved, which exception the trial Judge refused to allow. The matters referred to relate to a contest on settlement of final account as to a claim which had been allowed by an administrator, which allowance was contested by the heirs and distributees—petitioners—as improperly allowed. *Held*, such matters are not collateral to the proceeding.

Id.—Id. An allowed claim may be contested at such settlement (C. C. P., 1636) when such claim has not been passed on on the settlement of a former account, or on rendering an exhibit, or on making a decree of sale. Such does not appear to have been the case with regard to the claim in this case.

Application to have exceptions settled, referred.

H. S. Dixon, for petitioners.

By the COURT:

This is an application to prove certain alleged facts on which an exception was reserved, which exception, it is averred, the Judge of the Court below has refused to allow in accordance with the facts. We have examined the petition and answer, and are of opinion that the petitioners should be allowed to make proof of such facts.

The matters referred to in the petition and answer relate to a contest as to a claim which had been allowed by the administrator, which allowance is contested by the heirs and distributees of the deceased, who are the petitioners.

The Judge of the Court below refers to the matters in issue as something incidental and collateral to the proceeding before the Court. In this we cannot concur with him. The matters in contest relate to the allowance of a claim by the administrator of deceased, which, the petitioners allege, was improperly and unlawfully done; and these matters were brought before the Court in connection with the settlement of the final account of the administrator. An allowed claim may be contested at such settlement (C. C. P., 1636), when such claim has not been passed on on the settlement of a former account, or on rendering an exhibit, or on making a decree of sale. Such does not appear to have been the case with regard to the claim in this case.

We are of opinion that the prayer of the petitioners should be granted, and an order will be made that the petitioners be allowed to prove the facts alleged in their petition before Stuart S. Wright, on reasonable notice to be given.

In the Superior Court,

CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Department No. 4—WAYMIRE, J.

[Filed November 12, 1882.]

TILLIE P. OLIVER, PLAINTIFF,

VS.

SUPREME COUNCIL AMERICAN LEGION OF HONOR,
DEFENDANT.

MUTUAL BENEFIT SOCIETIES which obligate themselves to pay money upon the death of their members to their beneficiaries, are regarded in law as ordinary insurance companies, and are subject to the same rules.

CONTRACT OF INSURANCE — CONSTRUCTION. Whenever two constructions equally fair may be given, that which gives the greater indemnity shall prevail.

CONTRACT OF INSURANCE, WHEN COMPLETE. A contract of insurance is complete when the insurer offers to insure on certain terms and the offer is accepted by the applicant. The contract need not be in writing unless the law expressly requires it.

CONTRACT OF INSURANCE, MADE BY MAIL. The contract may be made through the medium of the mail, and terms offered are accepted upon the posting by the insured of a letter to that effect.

BENEFICIARY CERTIFICATE. In mutual benefit societies it is not absolutely necessary for a benefit certificate to issue. Such certificate is not the contract. It is merely evidence thereof.

MEDICAL EXAMINER-IN-CHIEF—REJECTION OF APPLICANTS. The Medical Examiner-in-Chief of the American Legion of Honor cannot reject applications arbitrarily, made in good faith after compliance with the requirements of the order.

MAXIM. Where the Medical Examiner-in-Chief of a mutual benefit society ought to have approved an application, but before he does so the applicant dies, the maxim "That which ought to have been done, will be regarded as done," will apply, and the application be deemed approved.

Boone & Miller, for plaintiff.

J. G. McCallum, for defendant.

WAYMIRE, J.:

Action to recover \$5,000 claimed to be due the plaintiff as the widow and beneficiary of H. G. Oliver by virtue of an obligation incurred by defendant under the following circumstances:

The defendant is a mutual benefit society, incorporated under the laws of Massachusetts, having as one of its objects the establishment of a benefit fund from which, on the satisfactory evidence of the death of a member of the Order, who has complied with all its lawful requirements, a sum not exceeding \$5,000 is to be paid to the family, orphans, or dependents of the member, as he may direct. The corporation has its prin-

cipal place of business in Boston, where its chief agents—Supreme Commander, Secretary, Treasurer, and Medical Examiner-in-Chief—have their offices. There are subordinate societies called councils established in the several States, and those who are admitted to membership in the councils become members of defendant—The Order of the American Legion of Honor—either honorary or beneficiary. Any person so admitted to membership, who is duly qualified as to moral character, physical soundness, and ability to earn a living, may, upon paying a fee according to age and degree, and upon application accompanied by the certificate of a medical examiner showing that he is an insurable risk, become "a beneficiary member." There are six degrees of such membership, the highest of which entitles the family or other dependents of the member, upon his death, to the sum of \$5,000. This sum is raised by assessments levied upon all the beneficiary members in proportion to the amount of their insurance and their age.

On April 13th, 1880, a council of the Order was instituted at East Oakland, Alameda County, known as Union Council, No. 168. H. G. Oliver applied to become a charter member thereof, and complied with all the laws of the Order regulating the admission of such members. He was examined by Dr. Fish, the Deputy Supreme Commander and Medical Examiner appointed by the defendant. The examination was reduced to writing, in questions and answers, upon a form furnished by the defendant. A copy of this paper, with a certificate annexed, to the effect that Oliver was a good insurable risk, was forwarded to Dr. Wilson, the Supreme Commander and Medical Examiner-in-Chief, at Boston. One of the questions prescribed in the form was as follows: "Is the character of the respiration full, easy and regular, and the murmurs clear and distinct over both lungs?" The answer to this question was written down by Dr. Fish "No." When Dr. Wilson came to examine the paper he discovered this. It was his custom to approve the report of an examination if satisfactory, and thereupon the insurance was deemed complete—the applicant became a member. If not satisfactory, he would indorse on the paper "Rejected," and then the fee would be returned to the applicant, and he would not be recognized as a beneficiary member. If he discovered some clerical or other error susceptible of correction, he would stamp the word "Irregular" opposite the error and return the paper to the council from which it came. In this case, the certificate that the applicant was an insurable risk being inconsistent with the answer "No," it was evident that a clerical mistake had been made by Dr. Fish; hence Dr. Wilson stamped the word "Irregular" opposite the word "No," given as the answer to the question quoted above, and returned the paper to Union Council. It was then referred to Dr. Fish, who on May 6th, 1880, received it, and immediately seeing it was a clerical

error, erased the word "No," inserted "Yes," and deposited the paper in the mail addressed to Dr. Wilson at Boston, postage paid. This was the last known of the paper so far as the evidence shows. Dr. Wilson testified that he did not receive it a second time. The Secretary of Union Council testified that he wrote to headquarters several times making inquiries about it, but received no answer. Oliver died November 4, 1880. From the time of sending on his application until his death he was treated as a beneficiary member by Union Council, and called on to pay assessments as other beneficiary members. He paid three assessments—all that were levied—and the money was forwarded to the Supreme Secretary. The money was received without objection, and no notification was ever given that he was not considered a beneficiary member by the Supreme Council until after his death. Oliver was appointed a Deputy Supreme Commander, and during the summer of 1880 he instituted many councils of the Order in California, being in constant correspondence with the authorities at Boston. He died in the belief that he was insured.

The defendant resists payment of the money on the ground chiefly that the application of Oliver was never in fact approved by the Medical Examiner-in-Chief, nor any certificate of insurance issued to him, relying upon the following provision of their laws: "Each person admitted as a charter member, subject to approval by the Medical Examiner-in-Chief, must deposit one assessment with the collector, to be returned if rejected, and credited if approved. Such person will not be subject to assessments or entitled to benefits until their examinations are approved, but will become beneficiary members on the day of the approval by the Medical Examiner-in-Chief, and they must be credited with their assessments on the date of approval, as above" (p. 33).

Mutual benefit societies which obligate themselves to pay money upon the death of members to their beneficiaries are regarded in law as ordinary insurance companies, subject to the same rules. (May on Insurance, Sec. 550a; *State vs. Merchants' Ex. Benev. Soc.*, 10 Ins. L. J. 59.)

One of the rules applicable is that "whenever two constructions, equally fair, may be given, that which gives the greater indemnity shall prevail." (May on Ins., Sec. 174.) A contract of insurance is complete when the insurer offers to insure on certain terms and the offer is accepted by the applicant. The contract need not be in writing unless the law expressly requires it. (*Hallock vs. Insurance Co.*, 26 N. J. (Law) 281; May on Ins., Secs. 14-23; *Insurance Co. vs. Coll*, 20 Wall. 560.)

A contract of insurance may be made through the medium of the mail, and terms offered are accepted upon the posting by the one party of a letter to that effect addressed to the other. (Civil Code, Secs. 1581-3; *Taylor vs. M. F. Ins. Co.*, 9 How. 390.)

In this case the defendant offered to insure upon certain terms—payment of a fee—good moral character and proper physical condition of the applicant to be shown by the certificate of a physician. Oliver complied fully with the requirements. He accepted the offer and did all he could do. The error in the answer was not his act. It was the fault of defendant's agent. It has not injured the defendant. If it had, the defendant could not be heard to complain of its own negligence. The failure of defendant's agent to issue the beneficiary certificate is immaterial. The certificate is not the contract. It is only evidence of it. The Medical Examiner-in-Chief has no right to arbitrarily reject an application made in good faith and after compliance with the requirements of defendant. He has no power to change the by-laws. He is merely an executive officer, authorized to see that applicants are qualified. In this case it is conceded that the applicant was qualified in every respect. It was the duty of the Examiner-in-Chief to approve the application. "That which ought to have been done is to be regarded as done, in favor of him to whom and against him from whom performance is due." This is a favorite maxim of the law, which has been expressly incorporated in our Code. (Civil Code, Sec. 3529.)

Judgment for plaintiff.

Abstract of a Recent Decision.

INSURANCE BROKER—AGENT.—It is well settled that an insurance broker is the agent of the party by whom he is employed to effect insurance, and not of the companies. *Fire Insurance Co. vs. Improvement Co.* Sup. Ct. Penn.; 3 Ohio L. § 231. (See 36 Mich. 502; 64 N. Y. 85; 3 Chic. Leg. News, 150; May on Ins. 123.)

New Law Publication.

THE AMERICAN SETTLER'S GUIDE, a popular exposition of the public land systems of the United States of America, by Henry W. Copp, Washington, D. C.; third edition. A useful reference book.

Pacific Coast Law Journal.

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Current Topics.

REMOTE AND PROXIMATE CAUSE.

In *Billman vs. Indianapolis, Cin. and La. F. R.*, 6 Am. and Eng. R. R. Cas. 41, there is a very thorough investigation of the question, When is an injury too remote? The facts of the case were that, owing to the negligent sounding of the whistle of a locomotive, a team of horses took fright, ran away, and collided with plaintiff's horse, thereby causing the death of the latter horse. The Court held the sounding of the whistle (under the circumstances) to be a wrongful act, the injury one likely to result from such an act, and the defendant, being a wrong-doer, liable, though another cause (not wrongful) intervened. The defendant's counsel argued that between the act of the defendant and the injury inflicted there was an intervening agency, *causa proxima, et non remota spectatur*. The Court, in a lengthy opinion, and after a careful review of the cases, overruled this defense. (See a very thorough discussion of this question in 1 Southerland on Damages, 20-74.)

THE ELEVATED RAILROAD CASES.

The *Albany Law Journal* of November 4th publishes the opinion of the New York Court of Appeals in the suit brought to restrain the building of the elevated railway on Front street. The Court holds that by virtue of the deed from the city to the original grantees Front street was to remain forever an open street; that this attached as an easement to plaintiff's land, and and that this easement is property, and cannot be taken without just compensation; that the erection of the elevated railway is such a violation of this easement as to amount to a taking of plaintiff's property, and that, therefore, an injunction should issue. Every owner of city property in the country will rejoice over this decision. It quashes the claim advanced by some that the individual property-owner may be compelled to suffer in order that the many may be benefited, and reaffirms the common law that no man can be deprived of his property without just compensation.

Supreme Court of California.

IN BANK.

[Filed November 15, 1882.]

No. 10,754.

PEOPLE, RESPONDENT, VS. PICO, APPELLANT.

GRAND LARCENY—HORSE—MARE—SEX—VARIANCE. Defendant was accused of grand larceny in stealing a horse. The statute is: "Horse, mare, gelding," etc. (Pen. C. 487.) The proof was that defendant stole a mare. *Held*, no variance.

ID.—ID. As at common law the word "horse" was used in its generic sense, and was held to include all animals of the horse species, whether male or female, the Legislature in using the word "mare" did not intend to modify or change the common law rule, but inserted the word possibly for more definiteness.

INSANITY. The claim of counsel that defendant was at the time of the alleged offense insane, and so continued: *Held*, not tenable.

ID.—REPUTATION—EVIDENCE. Insanity is not to be proven by general reputation.

ID.—HEARSAY TESTIMONY. For the purpose of showing insanity of defendant a witness testified to his throwing away a suit of clothes. On cross-examination it appeared that the witness had no personal knowledge of the clothes being thrown away or of the reason therefor; he knew of the circumstance only by hearsay. *Held*, his testimony was properly stricken out on motion.

ID.—ID. The Court properly sustained an objection to a question asked whether defendant was always treated by his family as an imbecile or insane person. How defendant was treated by his family would not tend to prove insanity; they may have been mistaken as to the condition of the subject and as to their mode of treatment. *Further*, the answer to the question would be but the opinion of one person based on the opinions of others.

ID.—ACQUAINTANCES—EXPERTS—DISCRETION. Persons were examined as witnesses on behalf of the people for the purpose of showing the sanity of the defendant. They were acquainted with him, and had more or less opportunity for acquiring knowledge on which to base an opinion. Objection was made that these witnesses had not shown themselves intimate acquaintances of the defendant. *Held*, the determination of the question as to whether the acquaintance was of an intimate character was within the discretion of the Court below, with the exercise of which, there being no abuse, this Court will not interfere.

ID.—FELONIOUS INTENTION—INSTRUCTION. The Court instructed the jury, in effect, that if defendant as a trespasser drove away the horse, not then intending to steal it, but thereafter, while in such wrongful possession of it, feloniously sold the same and appropriated the proceeds thereof to his own use, such taking, sale, and appropriation constituted the crime of grand larceny as fully and completely as though such felonious intention had existed at the first taking of the animal. *Held*, proper.

ID.—INSANITY. The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed, and is to be judged accordingly.

ID.—REASONABLE DOUBT. In all other matters except that of insanity defendant is entitled to every reasonable doubt.

ID.—ID. The Court also instructed the jury: "The defense of insanity is a defense which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fairly, fully and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt." *Held, proper.*

ID.—SENTENCE—JURY. Conceding that upon appeal from the judgment and order denying new trial the action of the Court on sentence day, in denying a motion to submit to a jury the question of defendant's sanity, can be reviewed, no error was committed. At the time of passing sentence the Court had no doubt as to the entire sanity of defendant.

Appeal from Superior Court, Santa Clara County.

A. W. Crandall, for appellant.

Attorney-General Hart, for respondent.

MYRICK, J., delivered the opinion of the Court:

The defendant was by information accused of grand larceny, in that he "did feloniously take and steal one roan horse," the property of one S. P. Stockton. The plea was not guilty. The defendant was convicted as charged.

1. It appears from the bill of exceptions that on the trial the people gave evidence tending to prove that the defendant took from the Normal School grounds in San Jose a roan mare, harness, and a buggy, belonging to S. P. Stockton, and after using the same in the public streets of San Jose, and declaring that the mare belonged to one Archer, left the harness and buggy by the side of a street, and sold the mare for ten dollars, and appropriated the proceeds to his own use.

The defendant moved the Court to instruct the jury to acquit him, on the ground of variance, in that he was charged with stealing a horse, while the proof showed the animal taken was a mare. This was refused.

Although the Courts of some of the States have held, under a statute similar to that of this State (Section 487,

subdivision 3, Penal Code), where both words "horse" and "mare" are used, the proof must agree with the indictment as to the sex of the animal, yet, as at common law the word "horse" was used in its generic sense, and was held to include all animals of the horse species, whether male or female, we are of opinion that the Legislature of this State in using the word "mare" did not intend to modify or change the common law rule, but inserted the word possibly for more definiteness.

2. The defendant introduced evidence tending to prove that he was insane before, at, and after the taking, and at the time of the trial. No suggestion was made by counsel then or at any time before or during the trial that defendant was not then in a condition to be tried. The District Attorney, during the trial, inquired of counsel for defendant if he asserted that defendant was then insane, to which one of the defendant's attorneys replied that they did not, and the other stated that they claimed he was at the time of the alleged offense, and still was insane. The bill of exceptions states that "it did not then or at any time during the trial appear to the Court that there was any doubt that defendant was not sane."

The defendant's attorney asked a witness: "What do you say as to his general reputation, whether sane or insane?" An objection was sustained.

Insanity is not to be proven by general reputation. The ruling was correct.

3. For the purpose of showing the insanity of the defendant, a witness testified to his throwing away a suit of clothes. On cross-examination it appeared that the witness had no personal knowledge of the clothes being thrown away, or of the reason therefor—he knew of the circumstance only by hearsay. This testimony was, on motion, stricken out. It needs no authority, save well-known principles, to show the correctness of this ruling.

4. A witness was asked if the defendant was always treated by his family as an imbecile or an insane person. Objection to this was sustained. This ruling was correct. How he was treated by his family would not tend to prove insanity; they may have been mistaken as to the condition of the subject and as to their mode of treatment; besides, the answer would be but the opinion of one person, based on the opinions of others.

5. Persons were examined as witnesses on behalf of the people for the purpose of showing the sanity of defendant. Their examination showed that they were acquainted with

him, and had more or less opportunity for acquiring knowledge on which to base an opinion. The opinions of these witnesses were objected to on the ground that they had not shown themselves intimate acquaintances of the defendant.

The witnesses having shown themselves respectively to have been acquainted with the defendant, the determination of the question as to whether that acquaintance was of an intimate character was within the discretion of the Court below, with the exercise of which, there being no abuse, this Court will not interfere.

6. The Court instructed the jury that the misdescription as to the sex of the animal was immaterial, and was no variance. Also as follows: "It is further claimed, that although the jury may believe the defendant took the animal in question, yet unless at the time of such taking he then intended to steal the same he must be acquitted. I instruct you that if the defendant wrongfully and unlawfully, and without the knowledge and consent of the owner of this animal, or of any person who could give such consent, but as a mere trespasser and wrong-doer drove away said horse, not then intending to steal the same, but that thereafter, while still in such wrongful possession of said horse, he feloniously sold the same and appropriated the proceeds of such sale to his own use, such taking, sale, and appropriation constitute, upon the part of the defendant, the crime of larceny as fully and completely as though such felonious intention had existed in the defendant at the first taking of such animal."

"It is further claimed on the part of the defendant that if he did in fact take, sell, and appropriate the proceeds of said property as claimed by the prosecution, he is not to be held criminally accountable for so doing, by reason of his insanity at the time of such appropriation and taking.

"The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed and is to be judged accordingly."

"The defense of insanity is a defense which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hope-

less. While, therefore, this was a defense to be weighed fairly, fully, and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt."

"In all other matters except that of insanity defendant is entitled to every reasonable doubt."

The defendant asked the Court to give instructions embracing the converse of the propositions contained in the foregoing instructions.

The instructions given by the Court are correct; it therefore follows that the instructions asked for and refused were incorrect. (*People vs. McDonnell*, 47 Cal. 134; *People vs. Dennis*, 39 Cal. 625; *People vs. Coffman*, 24 Cal. 230; *People vs. Myers*, 20 Cal. 518.)

7. After the verdict of conviction, the Court fixed January 23, 1882, as the day for sentence. On that day the Court heard evidence upon the question of the defendant's insanity at that time, and the Court, being in doubt upon that subject, continued the time for sentence to January 27, 1882, and directed that two competent physicians make an examination of him, and report as to defendant's insanity at that time. On the 27th the two physicians, having examined the defendant, were not fully determined whether he was sane or insane, and no report was made by them, and the time for passing sentence was postponed to January 30th. On that day defendant's counsel moved the Court to summon a jury to try the question of the present sanity of the defendant; the Court then, having no doubt as to defendant's entire sanity, denied the motion, refused to allow the question to be determined by a jury, and proceeded to pronounce the sentence.

These matters do not appear in the judgment, but are stated in a bill of exceptions. The appeal is from the judgment and from the order denying the motion for a new trial.

Conceding that upon this appeal we can review the action of the Court in denying the motion to submit to a jury the question of defendant's sanity, we do not see that an error was committed. The Court did not pronounce judgment so long as any doubt existed as to defendant's sanity. The object of the statute was accomplished. According to Section 1201, Penal Code, a defendant may show for cause against judgment that he is insane; and if, in the opinion of the Court, there is reasonable ground for believing him to be insane, the question of insanity must be tried by a jury.

At the time of passing the sentence the Court had no doubt as to the entire sanity of the defendant.

Judgment and order affirmed.

We concur: McKinstry, J., Ross, J., Morrison, C. J., Sharpstein, J., McKee, J.

IN BANK.

[Filed December 4, 1882.]

No. 8220.

THE CITY OF LOS ANGELES, APPELLANT,

vs.

THE LOS ANGELES CITY WATER COMPANY,
RESPONDENT.

CONTRACT—MUNICIPALITY—WATER—LEASE—BANK—DEPARTMENT. Opinion of department (9 Pac. C. L. J. 704) approved by the Court in bank, and additional authorities cited.

Appeal from Superior Court, Los Angeles County.

H. T. Hazard, for appellant.

Thom & Stevens, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the fifth day of July, 1882, Department Two of this Court delivered the following opinion in the above entitled case:

“The plaintiff being the owner of water works, in 1865 leased them to Sansevaine, who subsequently assigned to others, and they to the defendant. In 1868 the plaintiff made an agreement with the then holders of the lease by which, for an annual rent reserved, and other considerations named, the lessees and their assigns were granted the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit—they, however, to furnish water for the public schools, city hospitals and jails free of charge; and the city reserved the right to regulate rates. This agreement was ratified by the Legislature April 2, 1870. In 1870, after the defendant became the assignee of the lease, the above-mentioned agreement was, by ordinance, modified by reducing the annual rent to \$400, which sum, it was provided, ‘shall

be received in full payment for all rents due or to grow due from said water company to said city for the uses and privileges given and granted by said ordinance" [the ordinance of 1868].

In 1879 the Mayor and Council of plaintiff passed an ordinance to impose monthly rates of license upon all persons or corporations not municipal vending water for domestic purposes. This action was brought to recover such rates. The Court below rendered judgment for defendant, holding that under the lease and ordinances above referred to it was not liable to pay any sum.

The Court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868 were already vested in the defendant as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the Legislature. The city cannot, during the term of the lease, of its own motion increase the amount to be paid for the privileges granted.

It is hardly necessary to say that the point made by the appellant, that neither the city nor the Legislature can grant or alienate any of the rights of sovereignty, has no application to this case.

The case has been heard in bank, and the foregoing opinion is hereby approved, with the following addition thereto:

The case of *Stein vs. Mayor, etc. of Mobile*, 49 Alabama 362, is in point. It was there held that "the corporate authorities of the city of Mobile, having entered into a contract with Albert Stein on the twenty-sixth day of December, 1840, by which they transferred to him certain water works then belonging to the city for the term of twenty years, and until said water works were redeemed by the city as therein provided, granting to him the exclusive privilege of supplying said city with water during said term, and stipulating that on his performance of all the duties imposed on him by said contract he shall and may retain quiet possession of said water works during the said term without let, molestation, or hindrance on the part of the city; the corporate authorities of said city cannot, during the continuance of said contract, require the said Stein to pay herein a license or tax for carrying on his said business within the limits of the city."

The contract between the city of Mobile and Stein was substantially the same as the contract between the plaintiff and the party under whom defendant in this case claims, and there, as well as here, an attempt was made by the city authorities to impose upon the lessee the obligation of paying a license, or tax, for the privilege of carrying on the business. The Court in that case uses the following language:

"The ordinance complained of is not merely a police regulation. The police power of the city refers rather to the regulation of its morals than its property. Blackstone's definition of this power is : 'The due regulation and domestic order of the kingdom, whereby the inhabitants of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations.' (Black's Com. 162; Cooley's Const. Lim., p. 572 *et seq.*, and cases cited in the notes.) This is no regulation of this sort. It is simply a tax in restraint of a privilege already granted by the city to the grantee, Stein. The privilege or right to carry on the business of the Mobile Water Works in the city having been once granted cannot be reasserted. The ordinance which attempts this impairs the grant, and is void."

The case of *The Mayor, etc. of the City of New York vs. Second Avenue Railroad Company* was an action to recover a penalty of fifty dollars imposed by an ordinance upon the proprietor of every passenger railroad car running in the city of New York below One Hundred and Twenty-fifth street who should not procure a license from the Mayor for each car and pay annually therefor the sum of fifty dollars, and the defendant set up as a defense to the action an agreement made between the plaintiffs and the defendant's assignors, dated December 15, 1852, by which permission was granted to such assignors to construct and operate a railroad on Second avenue, and it was contended that the plaintiffs were estopped by such agreement from requiring any license. The Court of Appeals sustained the defense, holding that to require the railroad company to take out a license was imposing a tax upon it in derogation of its rights of property. (32 N. Y. 261.)

In a subsequent case, *The Mayor, etc. vs. The Third Avenue Railroad Company* (33 N. Y. 42), the same question was presented, and the same conclusion was reached. The Court there say:

"The increase of the sum payable as a license fee under the ordinance of 1858, beyond the amount provided for by

the stipulation in the contract of 1853, so far as it was in derogation of defendant's rights, must be deemed illegal and void. It was not the exercise of the power of municipal regulation reserved by the terms of the grant, and which the Common Council had no authority to obviate; but it was simply an attempt by one of the parties to a contract to revoke a provision inserted for the benefit of the other. The Common Council could not lawfully impose a penalty for non-compliance with an illegal exaction."

The authorities of the city of Los Angeles, by a contract (the validity of which has not been challenged by either party), and for certain valuable considerations therein expressed, granted to the defendant's assignors the privilege of supplying the city of Los Angeles and the inhabitants thereof with fresh water for domestic purposes, with the right to receive the rents and profits thereof to their own use. As was said by the Supreme Court of Alabama in the case of *Stein vs. Mayor, etc. of Mobile*, (*supra*), "the power to supply the inhabitants of the city with water necessarily implies the right to carry on the business in the city. If this right could be interfered with at all—as there is no limit to the interference—it may be defeated altogether. The contract shows that this was not the purpose of the parties. The city government is a creature of the State legislation. Its powers, then, are restrained by all the constitutional limits of the General Assembly of the State. It cannot pass by-laws or ordinances which impair the obligation of contracts. (Ang & Ames on Corporations, Sections 332, 333; Cooley's Con. Lim. pp. 192-3-4-5.) It cannot, then, revoke its grant. This would be to impair its contract. (6 Cranch, 137.) The ordinance which assails the privilege already granted impairs the contract on which it depends, and is void; and the tax levied under its authority, by way of license, cannot be supported."

The principles enumerated in the foregoing cases are eminently sound and just, and are directly applicable to the case we are now considering. The city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed November 24, 1882.]

No. 8673.

BELCHER CONSOLIDATED GOLD MINING COMPANY, RESPONDENT,

VS.

AUGUSTINE DEFERRARI AND CARLO DEFERRARI,
APPELLANTS.

MINING LAW—EJECTMENTS—DAMAGES—FINDING. Complaint in ejectment for mining land, with an averment of damages, caused by the excavation and removal of gold-bearing quartz by defendants during their adverse holding. The Court below failed to find expressly upon the issue as to damages, but rendered no damages therefor. *Held*, defendants (appellants) cannot complain of such omission, as they are not injured thereby. The judgment herein will constitute a bar to any further action to recover the same damages.

ID.—DEED—ESTOPPEL. The Court found that plaintiff, on the 9th day of April, 1878, became the purchaser "by deed from the defendants and others" of the mining claims described in the complaint, entered into possession, etc. *Held*, in the absence of proof of subsequently acquired title from a paramount source, the defendants are estopped from denying that they and their co-grantors were the owners of and entitled to the possession of the mining claims when the deed to plaintiff was executed.

ID.—ID.—JUDICIAL NOTICE—LOCATION. As the Court takes notice of the character of the property and its original ownership in the United States, the defendants were estopped from denying that they and their co-grantors (or those from whom they derived) had located the mines in accordance with the laws of the United States—the only way in which the title could be acquired.

ID.—LABOR. The Court found that in the year 1880 plaintiff expended in labor on the claims \$100; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor thereon \$24. Defendants entered and located in August, 1881. *Held*, as plaintiff had resumed work upon the claims "after failure and before location," his rights were not forfeited when defendants entered. (B. S. U. S., 2324.)

Appeal from Superior Court, Tuolumne County.

Street & Street, for appellants.

Edwin A. Rodgers, for respondent.

McKINSTY, J., delivered the opinion of the Court:

The complaint is in the ordinary form of ejectment, with an averment of damages, caused by the excavation and removal of gold-bearing quartz by defendants during their adverse holding.

1. The Court below failed to find expressly upon the issue created by the denial of the averment as to damages. It is urged by appellants that this failure necessitates a reversal

of the judgment. But no judgment was rendered for damages, and defendants, the appellants, cannot complain of an omission which did them no injury. The judgment herein will constitute a bar to any further action to recover the same damages.

2. It is said there is no finding that plaintiff or his grantors *located* the mine as required by Section 2324 of the United States Revised Statutes. The Court found that plaintiff, on the 9th day of April, 1878, became the purchaser "by deed from the defendants and others" of the mining claims described in the complaint, entered into possession thereof, etc.

In the absence of proof of subsequently-acquired title from a paramount source, the defendants are estopped from denying that they and their co-grantors were the owners of and entitled to the possession of the mining claims when the deed to the plaintiff was executed. As we take notice of the character of the property and its original ownership in the United States, the defendants were estopped from denying that they and their co-grantors (or those from whom they derived) had located the mines in accordance with the laws of the United States—the only way in which the title could be acquired.

3. The Court found that in the year 1880 plaintiff expended in labor on the two claims one hundred dollars; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor twenty-four dollars. Defendants entered and located in August, 1881. As the plaintiff had resumed work upon the claims "after failure and before location," his rights were not forfeited when defendants entered. (R. S. U. S., Sec. 2324.)

It is urged that the resumption of work was not such as is required by the Act of Congress; that if so, one may fail to perform the work required by the Act during any year, and yet keep alive his right indefinitely by doing *any* work during the January following. In other words, that, by such construction, while the Act requires one hundred dollars' worth of work each year, a party may keep his claim good by doing one dollar's worth each year, provided he shall succeed in doing it before a relocation can be accomplished. It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work; so plainly a sham as that will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the Court below, and forfeitures and denunciations are not to

be favored by basing them upon language which does not plainly and unmistakably provide for them.

Judgment affirmed.

We concur: McKee, J., Ross, J.

IN BANK.

[Filed November 15, 1882.]

No. 8307.

STEPHENSON, PETITIONER,

VS.

SUPERIOR COURT, RESPONDENT.

ADMINISTRATION—DEATH—PROBATE—MOTION—JURISDICTION. The Court in which was had administration upon the estate of a man supposed to have been dead, but who subsequently, and after the administration had been closed, appears "in the flesh," and moves the entry of an order vacating and annulling the proceedings, may grant such motion and enter such order.

ID.—ID. Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no "subject-matter" over which it is possible for any Court to exercise jurisdiction.

ID.—ID. Notwithstanding the Court of probate, before issuing letters of administration, must first determine affirmatively the question of death, the fact that the supposed intestate is alive may still be shown, and when shown establishes the nullity of the entire proceedings.

ID.—ID. The "subject-matter" in such case is the appointment of a personal representative to a *decendent* who is without one; without which subject-matter no jurisdiction can attach to the Court granting administration.

Review.

Wright & Wright and Pratt, for petitioner.

L. Quint, for respondent.

Ross, J., delivered the opinion of the Court:

The question in this case is whether the Court in which was had administration upon the estate of a man supposed to have been dead, but who subsequently, and after the administration had been closed, appeared "in the flesh," and moved the entry of an order vacating and annulling the proceedings, rightly granted the motion and entered the order. We have no doubt of the correctness of the action of the Court in that particular.

Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no "subject-matter" over which it is possible for any Court to exercise jurisdiction. It is true that the Court of probate, before issuing letters of administration, must first determine affirmatively the question of death. But, notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown, establishes the nullity of the entire proceedings. The authorities in support of this proposition are numerous. Sec. 1, Williams on Executors (American notes by Perkins) top page 632, and notes to page 631; Vol. VII, Robinson's Prac. p. 324; *Jochimson vs. Suffolk Savings Bank*, 3 Allen, 87; *Fisk vs. Newell*, 9 Texas, 12; *Duncan vs. Stewart*, 23 Ala. 484; *Allen vs. Dundas*, 3 T. R. 125.

In *Griffith vs. Frazier*, (8 Cranch, 23,) Chief Justice Marshall said: "Suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And, although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

In *Beckett vs. Selover*, 7 Cal. 226-7, this Court said that the fact of death and the place of residence of the deceased at the time of death must be alleged in the petition for letters, and must be true in point of fact, "and when they do not both exist in point of fact, the proceedings are utterly void and not voidable." Further on, the Court said: "It is apprehended that no one would insist that a grant or administration before the death of a person, however regular, could be sustained anywhere. The decision of the Probate Court, that the man was dead, would not be conclusive against him; and the fact of residence is of equal importance to give the particular Court jurisdiction, and the decision of one point is no more conclusive than the decision on the other." This case—*Beckett vs. Selover*—in so far as the question of the residence of the deceased at the time of death

is concerned, was overruled, and we think rightly so in the subsequent case of *Irwin vs. Scriber*, reported in 16 Cal. 499, but it has not been disturbed as respects the question of the *fact of death*. Nor do we think it ought to be deemed a great mistake to place the fact of determining the place of residence of the supposed intestate in the same category. Until there is a death there is no subject-matter for the jurisdiction of any Court. What is the subject-matter? It is the appointment of a personal representative to a *decedent* who is without one. If the subject-matter exists, the question whether the Court had jurisdiction in the particular case or not may depend, as said by the Court of Appeals of Virginia in *Andrews vs. Avery*, 14 Gratt. 236, "upon a variety of facts: as whether the deceased resided in the county whose Court made the order; or had land there; or died there; or had estate of any kind there. If, after passing upon these facts and taking cognizance of the case, the order of the Court could, at any period, in any collateral proceeding, be avoided by evidence that the decedent did not reside, or die, or leave estate in the commonwealth, all the inconveniences and other evils would be produced which are referred to in *Fisher vs. Bassett*, (9 Leigh) 119, and other cases before cited, and which are designed to be prevented by the principles laid down in those cases." Some of those evils are thus stated by Mr. Justice Rosevelt in the case of *Monell vs. Dennison*, 17 How. Pr. 426: "To allow it (the decision upon the question of inhabitancy) to be called in question collaterally, and on every occasion and during all time, would be destructive of all confidence. No business in particular depending on letters testamentary or of administration, could be safely transacted. Payments made to an executor or administrator, even after judgment, would be no protection. Even if the debtor litigated the precise point and compelled the executor to establish it by proof, the adjudication would avail him nothing should a subsequent administrator, as in this case, spring up, and, after the lapse of a fifth of a century, demand payment a second time, when a scintilla of evidence on one side remained and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors or administrators or their assigns. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence—a question often difficult to decide where the facts are close, and much more so, of course, where the facts are obscured by lapse of time and loss of

documents and witnesses?" Such a doctrine the Court correctly held too dangerous for judicial sanction.

But here was an application by a party whose estate had been administered upon the supposition that he was dead, to show to the Court in which the proceedings were had the fact that he was all along alive, and the consequent non-existence of the *subject-matter*, without which no jurisdiction could, by possibility, have attached to any Court. That it was competent for him to prove the fact we have no manner of doubt, and we are also of opinion that he sought to make the proof in the appropriate tribunal. (*State vs. McGlynn*, 20 Cal. 233; *Hamberlin vs. Terry*, 1 S. & M. Ch. R. 589.)

Demurrer sustained and proceedings dismissed.

We concur: McKinstry, J., Morrison, C. J., Sharpstein, J.
I concur in the judgment: Myrick, J.

CONCURRING OPINION.

I concur. Administration of the estate of a living person is void *ab initio* and throughout. The only jurisdiction a Probate Court has in respect to the administration of estates is over the estates of dead persons. It has no jurisdiction whatever to administer the estates of living persons as if they were dead. Cases in support of these plain propositions abound in the books. For it has often happened that many "Enoch Ardens" have had to assert in the Courts their right to property of which they have been, in their absence, unlawfully deprived by void proceedings against them in Probate Courts. In addition to those cited by Mr. Justice Ross, the cases of *McPherson vs. Cauliff*, 11 S. and R. 422; *Appeal of Peebles*, 15 *id.* 42; *Wales vs. Willard*, 2 Mass. 120; *Smith vs. Rice*, 13 *id.* 507; *Bolton vs. Jacks*, 6 Root. 166; *Morgan vs. Dodge*, 44 N. H. 255; *Meliu vs. Simmons*, 45 Wis. 334; and *D'Arnemend vs. Jones*, 4 Lea. 25, will be found instructive and conclusive upon the question involved in the present case. I know of no case opposed to the doctrine of those cases, except it be the case of *Roderigas vs. East River Savings Institution*, 62 N. Y. 460. In that case the Supreme Court of New York held that money paid to the administrator of a supposed decedent could not be recovered back, although it appeared that at the time of issuing the letters of administration the party was not dead. But in *Lavine vs. The Emigrant Industrial Savings Bank*, (18 Blach. 1,) in the Circuit Court of the United States for the State of New York, it was decided that that case had no support elsewhere in the authorities of the English or Amer-

ican Courts. A living person, says the Court, cannot be concluded by a Surrogate's decision that he is dead. As to him such a decree is absolutely void, and he may claim his property as taken from him "without due process of law."
McKEE, J.

IN BANK.

[Filed November 14, 1882.]

No. 8534.

FRAZER ET AL., PETITIONERS,

vs.

SUPERIOR COURT OF SAN FRANCISCO, RESPONDENT.

PRACTICE—STATEMENT ON MOTION FOR NEW TRIAL—REPORTER'S NOTES.

The trial Court is justified in refusing to settle a statement on motion for new trial which simply refers to the reporter's notes, and does not set forth any of the evidence in the case.

E. W. McGraw, for petitioners.

T. I. Bergin, for respondent.

By the COURT:

This is an application for a writ of mandamus to compel the Hon. T. K. Wilson, a Superior Judge of the city and county of San Francisco, to settle plaintiff's statement on motion for a new trial. When the statement was served on the attorneys for the adverse parties, and before any amendments thereto were proposed, defendants "protested against the pretended statement on motion for a new trial which had been served upon them, that it is utterly insufficient, and fails to set forth any proper statement of the case. It merely amounts to a reference to the reporter's notes, without incorporating said notes in the proposed statement." The learned Judge, in denying the motion to settle the so-called statement, placed his refusal on the ground that "the proposed statement is wholly insufficient, as a proposed statement on motion for a new trial, and must be disregarded." We think the motion to settle the proposed statement was properly denied. It does not set forth any of the evidence in the case, but simply refers to the reporter's notes. Its language is: "All of which" (the facts in the case) "will more fully appear from said statement of the facts, which reads as follows (insert reporter's notes in full)." Such a statement is not a proper one, and the Court may disregard it. (*People vs. Getty*, 49 Cal. 584; *People vs. Sprague*, 53 Id. 422.)

Application denied.

DEPARTMENT No. 2.

[Filed November 14, 1882.]

No. 7503.

STRUEVEN, RESPONDENT,

vs.

HIS CREDITORS, APPELLANTS.

INSOLVENCY—PLEADING—VERIFICATION. The Insolvency Act of 1852 did not require the answer of the petitioner to the opposition of a creditor to be verified. The Insolvent Act of 1880 requires verification of the pleadings. This requirement concerns procedure merely, and governs pleadings filed after its passage.

ID.—PRACTICE—OBJECTIONS—APPEAL. The objection that the opposing creditor had not proved his claim before filing his opposition, is taken too late when taken in the appellate Court for the first time.

Appeal from Superior Court, San Francisco.

William Matthews, for appellants.*H. H. Lowenthal*, for respondent.

By the COURT:

The insolvency proceedings were commenced under the Act of 1852. That Act did not require the answer of the petitioner to the opposition of a creditor to be verified. Prior to the filing of the answer in this case, the Legislature had passed the Insolvent Act of 1880, which requires verification of the pleadings. This requirement concerns procedure merely, and governs pleadings filed after its passage. According to Section 68 of the Act of 1880, that Act is not to affect *any case* previously instituted; but there is no indication of an intention to keep alive the former mode of procedure in conflict with the Act. The Court erred in dismissing the opposition and in making a decree of discharge.

The objection that the opposing creditor had not proved his claim before filing his opposition, is taken too late when taken in this Court for the first time.

Judgment reversed, and cause remanded for further proceedings.

DEPARTMENT NO. 1.

[Filed November 24, 1882.]

No. 8504.

HART, RESPONDENT, vs. SPECT ET AL., APPELLANTS.

BILL OF PARTICULARS—EVIDENCE—ACCOUNT. After a bill of particulars had been demanded and an account rendered by plaintiff, defendants moved that, inasmuch as plaintiff had failed to comply with the order of the Court, he be precluded from giving any evidence in support of his complaint. No application was made for an order for a further account. *Held*, it is only where a party has failed or refused to deliver to the adverse party on demand a copy of his account that the latter is entitled to an order that the former be precluded from giving evidence.

Appeal from Superior Court, Colusa County.

Dyas & Bridgeford and Stevens, for appellants.*Hart & Swinford and Bayne & Hart*, for respondent.

By the COURT:

The complaint is to recover the value of legal services. Defendants demanded a bill of particulars, which was served. The Court made an order that plaintiff furnish a further account in writing of the items of the claim, setting forth the number of suits in which services were performed, the title of each suit, and the value of the services rendered in each suit, together with the date at which each item of service became due.

Plaintiff then served the further account following:

"JONAS SPECT AND LOU G. SPECT,

To A. L. HART, Dr.,

May 16, 1880—To services as attorney-at-law in litigation involving the title to lots in the town of Colusa\$10,000

Cr.

December, 1881—By cash paid..... 500

Balance..... \$9,500

This litigation embraced the trial of the following causes, to wit:

TITLE OF CAUSE.	WHERE TRIED.
Spect <i>vs.</i> Gregg.....	District and Supreme Courts.
Spect <i>vs.</i> Bundy.....	District and Supreme Courts.
Hagar <i>vs.</i> Spect.....	District and Supreme Courts.
Montgomery <i>vs.</i> Spect.....	District and Supreme Courts.
Spect <i>vs.</i> Arnold.....	District and Supreme Courts.

Said litigation also involved the management and trial of the following causes, up to the 19th day of May, 1880, to wit:

Title: Spect vs. Cheney, No. 930; Yates vs. Shearer and Dean; Spect vs. McGrath et al.; Spect vs. Gill; Spect vs. Town of Colusa; Spect vs. Minchum; Spect vs. Warner; Spect vs. Liening; Spect vs. Peyton; Spect vs. Grover; Spect vs. McLaughlin; Spect vs. Cheney, No. 797; Spect vs. Spittler; Spect vs. De Jarnatt.

Said services involved the general management of said litigation, and entitled me to a fee for the entire service, the amount of which was not fixed, but was contingent upon final success or recovery; hence there is and can be but one item of charge to the account.

Respectfully,

A. L. HART."

Defendants moved that, inasmuch as plaintiff had failed to comply with the order of the Court, plaintiff be precluded from giving any evidence in support of his complaint. The Court denied the motion, and defendants excepted.

It will be observed that no application was made to the Court below for an order for a further account. It is only where a party has failed or refused to deliver to the adverse party on demand a copy of his account that the latter is entitled to an order that the former be precluded from giving evidence.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed November 15, 1882.]

No. 7534.

WARREN, APPELLANT,

VS.

SCHAINWALD ET AL., RESPONDENTS.

PARTNERSHIP—SETTLEMENT—FRAUD—TRUST—MISREPRESENTATION—PURCHASE—ACCOUNTING. Plaintiff and defendants and others entered into a copartnership under the firm name of R. W. Warren & Co. Pokoney, a member of the firm, died September, 1878. The surviving members continued the business under the firm name until January 10, 1879, at which time the entire assets of the firm were sold. In December, 1878, plaintiff and defendants had a meeting, at which one of the defendants stated that the interest of Pokoney's estate could be purchased for \$3,000, and defendants expressed a willingness to purchase it at that price, but plaintiff then and there falsely stated that he was the owner thereof. Defendants were prevented from effecting such purchase by such misrepresentations. The Pokoney interest was transferred to one L. and on January 15, 1879, he

sued the surviving members of the firm for a settlement and accounting of the partnership, and afterward plaintiff herein compromised the suit by paying L. a sum less than \$3,000. The object of the present action is to charge defendants with the profits of the business which would be due the estate of Pokoney if such interest were still in the estate. The Court below held that after plaintiff was repaid the amount expended by him in compromising the L. claim, the residue of the profits accruing to the Pokoney interest should be divided among the surviving partners of the firm, according to their respective interests in the business of the copartnership. *Held*, proper.

IN.—IN. It is apparent from the facts in the case that the Pokoney interest would have been purchased by the surviving partners for their mutual benefit if the plaintiff had not prevented such purchase by misrepresentation. Under the circumstances of the case he was justly held to have purchased for the benefit of himself and the defendants, his copartners.

Appeal from Superior Court, San Francisco.

Naphtaly, Freidenrich & Ackerman, for appellant.

Chickering & Thomas, for respondents.

By the COURT:

On the eighteenth day of April, 1877, the plaintiff Warren and the defendant Schainwald and others entered into a copartnership for the manufacture of powder, under the firm name of R. W. Warren & Co.

One Louis Pokoney was a member of the firm, and he departed this life in the month of September, 1878.

After the death of Pokoney, the surviving members continued the business under the firm name until the tenth day of January, 1879, at which time the entire assets of the firm were sold and transferred to the Vulcan Powder Company.

In the month of December, 1878, the plaintiff and the defendants, Schainwald and Baum, had a meeting, at which one of the defendants stated that the interest of Pokoney's estate could be purchased for the sum of three thousand dollars, and the defendants expressed a willingness to purchase it at that price, but the plaintiff then and there stated that he was the owner thereof, and thereupon the defendants refrained from purchasing the same. The finding shows that the defendants were prevented from effecting such purchase by the statement of plaintiff. The Court further finds that "the statement made by the plaintiff was untrue, and was made for the purpose of preventing the proposed settlement."

The Pokoney interest was transferred and assigned to one Lilienthal, and on the fifteenth day of January, 1879, he brought a suit against the surviving members of the firm of R. W. Warren & Co. for a settlement and accounting of the

partnership dealings, and thereafter, in the month of September, 1879, the plaintiff Warren compromised said suit by paying the plaintiff therein a sum less than three thousand dollars.

The object of the present suit is to charge the defendants with the profits of the business which would be due to the estate of Pokoney if such interest were still in the estate. The Court below held that after Warren was repaid the amount expended by him in compromising the Lilienthal claim, the residue of the profits accruing to the Pokoney interest should be divided among the surviving partners of the firm of Warren & Co. according to their respective interests in the business of the copartnership.

We think the judgment of the Court below was correct. It is apparent from the facts in the case that the Pokoney interest would have been purchased by the surviving partners for their mutual benefit if the plaintiff Warren had not prevented such purchase by misrepresentation. Under the circumstances of the case he was justly held to have purchased for the benefit of himself and the defendants, his copartners.

Judgment and order affirmed.

In the U. S. Circuit Court, District of Nevada.

[Filed November 9, 1882.]

BUCKLEY

VS.

GOULD & CURRY SILVER MINING COMPANY.

1. **NEGLIGENCE OF FELLOW-SERVANT.** The employer is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same line or department of employment; provided the employer exercises due care in the selection of competent servants.
2. **WHO ARE FELLOW-SERVANTS.** The runner of a steam-engine employed in lowering men and material, and hoisting rock in sinking a shaft, is a fellow-servant in the same line or department of service, within the rule, with the men in the shaft engaged in excavating the shaft and loading the rock to be hoisted.
3. **NO WARRANTY—ONLY DUE CARE REQUIRED.** The employer does not warrant the competency of his servants. He is only bound to exercise due care in the selection of careful and competent men for the service to be performed.
4. **EVIDENCE OF INCOMPETENCY.** The mere fact that an accident occurred, though evidence of negligence on that particular occasion, is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged.
5. **INSTRUCTION TO JURY IN ABSENCE OF EVIDENCE.** Upon the close of plaintiff's testimony, if the evidence is insufficient to justify a verdict for plaintiff, the Court will instruct the jury to find for the defendant.

Before SAWYER, Circuit Judge, and SABIN, District Judge :

This case was tried by a jury. At the close of plaintiff's testimony the defendant's counsel asked the Court to instruct the jury to find a verdict for the defendant, on the ground that there was not sufficient testimony to go to the jury or to justify a verdict in favor of the plaintiff.

W. E. F. Deal, for plaintiff.

B. C. Whitman and *M. N. Stone*, for defendant.

By the Court, SAWYER, Circuit Judge, delivering an oral opinion:

We have carefully considered the motion to instruct the jury to find a verdict for defendant in this case. The main question is whether the engineer—runner, as he is termed, of this engine—is a fellow-servant with the plaintiff in this case within the meaning of the rule, which asserts the principle that the master is not liable for an injury resulting to one servant from the negligence of a fellow-servant in the same line of employment. We are fully satisfied that he is a fellow-servant within the principle and meaning of the rule. We have no doubt on that point. We do not think *Hough vs. Railway Company*, 100 U. S. 213, cited by the plaintiff, militates against that proposition. On the contrary, we think it is an authority directly in favor of defendant in this case. The Court in that case recognizes the rule; it does not question it; it only notices the distinction which takes that case out of the rule.

Mr. Justice Harlan, in delivering the opinion, says that the English authorities go much further in favor of the doctrine of the immunity of the master from the responsibility for injuries received by a servant in consequence of the negligence of his fellow-servant in the same line of employment than the American Courts. But the decision in *Hough vs. The Railroad Company* is put upon another ground, namely: that the act complained of in that case was the act of the company itself. A corporation must always act through its agents. The rule is recognized that the company is bound to use all reasonable care and diligence in furnishing suitable and safe machinery for its servants to work with. In that case there was a violation of that rule. The defendant did not furnish a good and sufficient cow-catcher and steam-whistle. The accident occurred in consequence of the improper condition of the locomotive engine. The engine ran off the track by reason of a defective cow-catcher, and the steam-whistle was blown or knocked off in consequence of not being properly fastened, and the engineer was scalded to death by the escaping hot steam. It was the duty of the company to use all reasonable diligence to furnish a safe engine. To furnish a safe engine is one thing, but its management by the engineer is quite another. The engineer was simply an employee, working with the machinery. That machinery had to be furnished by those charged with that duty. Those men in charge, furnishing and supervising the engine,

were the agents of the corporation for that purpose. This service could only be performed by a corporation through agents. Therefore their acts were the acts of the corporation, and not merely of fellow-servants. They were the acts of the corporation, through its agents, in furnishing machinery to work with. The decision is put upon that ground alone, and the Court recognizes it as not being within the rule. It would have been the same in this case if the engine that was used in this mine had been a rickety, defective old engine, out of order, and the accident had resulted from the use of that engine in consequence of its defects. Then this case would have been precisely like the one cited.

But the foundation of this action is, that the accident was the result of the carelessness of the man who was running the engine. He was not an agent of the company. He had no authority over the plaintiff. He was merely a workman running an engine under the direction of a chief engineer, a general foreman, and a superintendent of the mine. It was not his business to furnish the engine. He had no authority whatever. He was co-operating with plaintiff in sinking the shaft. He was simply a fellow-servant co-operating in sinking the shaft. We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work, but doing it by different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine-runner, as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment, to accomplish a common end—the sinking of a shaft. One servant performed one part, and another another part.

In the old Spanish mines, in early days, and even yet in some parts of Mexico and South America, the ore is carried in sacks upon the backs of men by climbing up and down ladders instead of using an engine. In sinking this shaft, if instead of the steam-engine used in carrying down the fuse and powder for a blast—the work actually engaged in at the time of the accident—or in raising the rock, the party running the engine had gone up and down a ladder, carrying the material used in mining down and the rock up, we apprehend that no one would have asserted that he was not a co-servant in sinking the shaft—that he was not performing a common service in the same line or department of employment with those below. The fact of using another appliance does not change the character of the act; it was the same work. The authorities go to that extent. Take the case of *Wood vs. New Bedford Coal Company* (121 Massachusetts 252). The plaintiff was a laborer employed in hoisting coal by ma-

chinery operated by a steam-engine. When it was hoisted to a certain height the man running the engine was to stop it. There was a man near the point where the coal was discharged to man- age and empty the coal by means of a crank. The engineer hoisted the bucket too high, so that it went past the point where he should have stopped, and thereby the man at the crank was struck by it and severely injured. In that case the engine-runner and the man at the crank aiding to discharge the coal were held to be fellow-servants in the same department of employment, and the company not liable. That is in all respects like this, at least, so far as the principle is concerned.

Again, in *Kelly vs. Norcross* (121 Mass. 508), the carpenters were charged with building a staging. The employers furnished suitable materials and committed the duty of building the stag- ing to the carpenters, who had charge of the work themselves. The carpenters were superintending the construction of the staging, and the accident resulted from their negligence. An accident happened by which the staging fell and injured some of the laborers. They were held to be fellow laborers within the rule.

In another case—*Holden vs. Fitchburg Railroad*—(129 Mass. 268)—the head-note reads: "The rule of law that a servant can- not maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the in- jury is a sub-manager or foreman of higher or greater authority than the plaintiff.

"A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad."

In this case parties were employed in widening the road, and for the purpose of performing that work a derrick was erect- ed. That is no part of the business of running a railroad. It is widening a road—enlarging its facilities. A train coming along, his derrick fell, and a brakeman passing this wreck was injured by a rope attached to the fallen derrick. He was engaged in running the train. The other men were engaged in widen- ing the road for the company. They were held to be fellow-ser- vants within the meaning of the rule. If they were so, these parties here must be fellow-workmen.

In *Cooper vs. Mil. & Pra. Du. C. R. Co.* (23 Wis. 669), a flag- man, who failed to properly notify the train of a break in the road, was held to be a fellow-servant with a brakeman on the train, killed in consequence of the negligence.

So, also, in a Wisconsin case, where a train went out to clear the track of snow. They had a party of snow-shovellers, designed to shovel snow off the road. The conductor concluded to clear the road at a certain point with a snow-plow. He made a rush into the snow with his snow-plow, and the result was that the train was thrown from the track. One of the snow-shovelling party going to his work was injured. The snow-shoveller injured was held to be a co-laborer in the same employment with the conductor, and the employer not liable on that ground. (*Howland vs. Mil. L. S. & W. R. R. Co.* 13 The Reporter, 607; also, see cases cited.)

In Michigan an engineer and conductor of freight trains are held to be fellow-servants. (*Mich. C. R. R. Co. vs. Dolan*, 32 Mich. 510.)

In *Collier vs. Steinhart*, (51 Cal. 117) it was held that the engineer running the engine to hoist water from a mine, by whose carelessness a tub of water fell upon a laborer at the bottom of the mine and injured him, was a fellow-servant with the party injured within the rule.

So in *McLean vs. Blue Point Gravel Mg. Co.* (Ib. 257), McLean being in the hydraulic department, was injured by the carelessness of Regan, foreman in the blasting department of the "general business." McLean and Regan were held to be fellow-servants within the rule.

These are only a few of the many cases found in the books which illustrate this point. We do not find anything against it. The case of *Kielley vs. Belcher Silver Mg. Co.* (3 Saw. 500) on the trial is a similar case. We do not think the decision on the demurrer in that case militates against the principle. (Ib. 437.) The judge who delivered the opinion on the demurrer concurred in the opinion at the trial. They were not considered to be in conflict. We think the plaintiff and this runner of the engine were in the same line of employment, and substantially in the same department of service. There can be no recovery for any injury resulting from the negligence of his co-servant on that ground. There is nothing, then, to go to the jury on that point.

The next point is on the allegation in the complaint that the company employed an unskillful engineer. That allegation falls short of being sufficient. The company is not bound under all circumstances and at all events to employ a skillful and competent engineer. It is only bound to exercise due diligence and care in that respect. It does not warrant that he shall be skillful, but it is bound to use due diligence in providing or employing a skillful and competent engineer. It may have fully performed that duty. If it did it is not liable. There is no allegation that it did not exercise due diligence or was negligent in this respect; but the fact only is alleged that the engineer was unskillful. Conceding it to be otherwise, there is no testimony here to show that this engine-runner was not a competent party. The only testimony is the fact that in this in-

stance an accident happened. An accident may happen to the most competent and skillful man. He may have for years been without fault, and the fact that in this instance he was negligent is not inconsistent with the idea that he was generally a careful man, and entirely competent to perform the duties which he performed. And the mere fact of the single accident, although evidence of negligence in that particular instance, is not sufficient evidence, as held by many authorities, of incompetency or that he is not a careful man. Quite a number of cases to that effect were cited on the argument, and none have been cited to the contrary. In *Wood vs. Bedford Coal Company* (121 Mass.) it was alleged that defendant knowingly employed an incompetent engineer. The accident happened, yet the Court says :

"The declaration alleges as one ground of the defendant's liability that it knowingly employed an unskillful and incompetent person as engineer. The plaintiff does not contend that there was any evidence to support this allegation."

Even counsel for plaintiff did not contend that the accident was evidence of the incompetency of the engineer.

"The difficulty of the plaintiff's case is that the evidence clearly shows that the injury to him was caused by the negligent act of a fellow-servant."

Just so in this case. There is no evidence here upon this point.

Again, in the case of *Kelley vs. Norcross*, before cited, where the staging fell, the accident happened, but the Court said:

"There was no evidence that the men were not in all respects competent workmen, or that the materials provided were unsuitable; and, without some such evidence, there was upon these points no question upon which the plaintiff was entitled to go to the jury. If there was neglect on the part of the carpenters, either in the construction of the staging or in leaving it, after it had been partially constructed, to be continued or completed by the masons; it was the neglect of the fellow-servants of the plaintiff's intestate, who were competent to have properly performed the work."

The mere fact of the negligence was held to be no evidence to go to the jury.

In *Cooper vs. The Milwaukee and Prairie du Chien Railway Company* (33 Wis. 671) it was said: "But all this is to no purpose, so long as it is not shown that the company, its officers or agents, were negligent in the employment of these persons, or in retaining them in its service. The negligence of the company, its officers or agents, in employing careless and unfit servants, is the gist of the action; and unless this be shown there can be no recovery. * * * Aside from the proof of negligence in the servants on the occasion in question, which is, clearly, not enough to charge the company, there is not the slightest evidence show-

ing, or tending to show, negligence on the part of the company in the employment of those servants."

This case is directly in point. These are only a few out of a great many cases deciding that question. There is not a particle of evidence, other than the fact of the accident, in this case that this engine-runner was not entirely competent, or that he was not a careful man. The testimony of the plaintiff shows that the engine-runner had been an engineer long before he went on this mine, and that plaintiff knew it.

The mere fact that he was negligent at this time is not sufficient evidence of his incompetency. There are numerous cases to the same point. There is no testimony sufficient to go to the jury to show his incompetency. And not only must it appear that he was not in fact incompetent, but also that the company did not use due care in employing him. If the allegation were sufficient, there is nothing to show on any of those points that the defendant is liable.

The only other point is as to whether there is anything to go to the jury upon the question of the bell. We are satisfied, on that point, that there is nothing to justify the jury in finding that the accident resulted from the breaking down of that bell. On the contrary, the testimony shows that the accident resulted from the negligent act of the runner of the engine. No one testifies that plaintiff could have escaped if the bell had been there. The testimony of plaintiff's witness, Cumelford, is that he could not have got out—that there was not sufficient time had the bell rung. The cage came down so rapidly that he could not have got out of the way. There is no testimony that he could have got out of the way. The testimony is that the cage, ordinarily, came down to the place where the bell was and stopped, and only came down from that point at a given signal from below. But this time it did not stop. It was the ordinary practice to stop it within fifty feet of the bottom and there wait until the signal to lower it was given, and then to lower it slowly. But at this time it not only came down without stopping, but it came rapidly.

At the time of the accident it came down with great rapidity. The engineer did not even stop the engine when the cage reached the bottom, for there were some forty feet of cable piled up on top of the cage. The testimony clearly shows, and there is nothing to the contrary, that the accident resulted purely and solely from the carelessness of the engineer in dropping the cage down at a rapid rate, without stopping or giving any notice. The accident, therefore, resulted from the negligence of a co-laborer in that employment. If the jury were to find, upon such testimony, that the accident resulted from the absence of this bell, we should be compelled to set aside the verdict. We feel bound, therefore, under repeated rulings of the Supreme Court, to grant the motion, and we shall so instruct the jury.

Instruction and verdict accordingly.

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Current Topics.

ESTATES TAIL.

The Supreme Court of Iowa hold that the statute *de donis* is not applicable to the habits and conditions of our society, nor in harmony with the spirit, genius and objects of our institutions, and hence is not in force as a part of the common law of the State. The question arose upon a contest between the grantee of A and the heirs of A by her husband B begotten, such being the terms of the original deed to A. It was held that, upon the birth of heirs by B, the conditional fee became absolute, and not an estate tail. (*Pierson vs. Lane*, 14 N. Y. Rep. 90.)

AMERICAN LAW REVIEW.

From the *Albany Law Journal* we clip the following :

"The publishers of the *American Law Review* announce that after the issue of the number for December next, it will be published by the Review Publishing Company of St. Louis, to which company they have transferred the *Review*, its copy-right title, and the right to use its name. It is to appear hereafter in consolidation with the *Southern Law Review*. We sincerely regret the discontinuance of our honored and useful neighbor, the *American Law Review*. Always a judicious and excellent publication, its last days have been its best. It has had editorial service of several very clever men. Especially we shall miss the brilliant and striking articles of Mr. Grinnell, the present editor, who possesses the rare art of making law interesting to everybody. We hope that his pen will not be lost to legal journalism, and we cannot believe that it will be. The consolidation of the *American* with the *Southern Law Review* will strengthen the latter already influential and admirable publication, and will add to the prominence of St. Louis as one of the most important, if not the most important, of the law publishing towns of this country. We wish the *Southern Law Review* increased success and influence, and we drop a tear over the demise of our old friend, the 'deep blue,' and its successor, the 'light gray.'"

We regret the discontinuance of the *American Law Review*, and wish great success to the consolidation of the *American* and *Southern Law Reviews*. We hope that Mr. Grinnell will remain in the field of legal journalism, where he has no equal as a writer of interesting and readable law articles.

Supreme Court of California.

IN BANK.

[Filed November 28, 1882.]

No. 8440.

THE PEOPLE EX REL. KNIGHT, APPELLANT,
VS.
BLANDING, RESPONDENT.

HARBOR COMMISSIONER—OFFICE—LEGISLATURE—EXTRA SESSION—APPOINTMENT—SENATE—GOVERNOR. Defendant was appointed to the office of State Harbor Commissioner on March 8, 1878, to hold for the term of four years. March 8, 1882, the Governor of the State commissioned relator to the office, having therefore, to wit, at an extra session of the Legislature in 1881, received the consent of the Senate thereto. *Held*, not necessary to consider the question whether the Governor could constitutionally convene the Legislature in extra session for the sole purpose of having the Senate consent to his appointments; nor to inquire whether that was one of the subjects specified in the proclamation by which he convened the Legislature at that time. The Legislature had no power to act upon that subject, whether it was specified in the proclamation or not, and the constitutional prohibition is limited to subjects upon which the Legislature would have power to legislate in the absence of any prescribed limitation. The constitutional limitation on the power of the Legislature to legislate when convened in extra session does not apply to this case.

Id.—Id. The respondent's term of office commenced at the date of his commission (March 8, 1878,) and by virtue of it he was entitled "to hold for the term of four years" and no longer, except in default of the appointment and qualification of a successor to take the office at the expiration of that period. Commencing, as it did, on the eighth day of March, 1878, it closed on the seventh day of March, 1882—which preceded the date of the relator's commission.

Appeal from Superior Court, San Francisco County.

Clunie, Knight, and Barnes, for appellant.

Wallace, Greathouse & Blanding, for respondent.

MYRICK, J., delivered the opinion of the Court:

There are two grounds upon which it is claimed that the appointment of the relator to the office of Harbor Commissioner is invalid.

1. That the consent of the Senate to said appointment was given during the extra session of the Legislature of 1881, when it was convened, by proclamation of the Governor, for the purpose of legislating upon certain subjects specified in said proclamation.

In our view of the matter, it is not necessary to consider whether the Governor could constitutionally convene the Legislature in extra session for the sole purpose of having the Senate consent to his appointments. Nor is it necessary to inquire whether that was one of the subjects specified in the proclamation by which he convened the Legislature at that time. The fact that the Legislature was lawfully convened on that occasion, and that while so convened the Senate consented to the appointment of the relator is not disputed. The Legislature had no power to act upon that subject, whether it was specified in the proclamation or not, and the constitutional prohibition is limited to subjects upon which the Legislature would have power to legislate in the absence of any prescribed limitation. The prohibition applies only to acts of legislation, and it was wholly unnecessary to prohibit legislation by the Senate because the Senate alone could not legislate. It might pass any number of bills, but until concurred in by the other House and approved by the Governor, they would have no validity. Therefore the constitutional limitation on the power of the Legislature to legislate, when convened in extra session, does not apply to this case, and the Senate had the same power to consent to the appointment of the relator that it would have had if the Constitution had authorized the Governor to call an extra session of the Legislature whenever he should deem it advisable to do so, without imposing any other limitations upon its power to legislate when so convened than are imposed on its power to legislate when convened in regular session.

2. The commission of the respondent is dated on the 8th of March, 1878, and by it he was appointed and commissioned "*to hold for the term of four years.*"

It is insisted that under this appointment his term of office did not expire before the close of the 8th day of March, 1882, and therefore that the appointment of the relator, whose commission is dated on that day, was made before the expiration of the respondent's term of office; and that the statute did not authorize the appointment of a successor to the respondent until his term of office should expire. Conceding, which we do not, that if the relator had been appointed before the expiration of the respondent's term of office, such

appointment would have been invalid, we do not think that that question arises in this case. The respondent's term of office commenced at the date of his commission, and by virtue of it he was entitled "to hold for the term of four years," and no longer, except in default of the appointment and qualification of a successor to take the office at the expiration of that period. Commencing, as it did, on the 8th day of March, 1878, the respondent's term would expire at the close of the 7th day of March, 1882, which preceded the date of the relator's commission.

Judgment reversed, with directions to the Court below to enter judgment in accordance with the prayer of the plaintiff's complaint.

We concur: Morrison, C. J., McKee, J., Sharpstein, J.

IN BANK.

[Filed November 28, 1882.]

No. 6287.

SANTA CRUZ RAILROAD COMPANY, RESPONDENT,
vs.
THE BOARD OF SUPERVISORS OF SANTA CRUZ
COUNTY, APPELLANT.

BONDS—SUBSIDY—CASE FOLLOWED. *Nevada Bank vs. Steinmetz*, November 17, 1882, followed.

Appeal from Twentieth District Court, Santa Cruz County.

Skirm and Logan, for appellant.

Younger and Taylor & Haight, for respondent.

By the COURT (McKee, J., Myrick, J., and Thornton, J., dissenting):

We are satisfied, from the record, that the conditions precedent upon which the respondent was entitled to have the bonds issued to it had all been performed by it before the commencement of this proceeding, and therefore that the judgment appealed from should be affirmed. (*Nevada Bank vs. Steinmetz*, November 17, 1882.)

Judgment affirmed.

DEPARTMENT No. 2.

[Filed December 5, 1882.]

No. 8432.

PIERCE, APPELLANT, vs. SCHADEN ET AL., RESPONDENTS.

VERDICT—PROMISSORY NOTE—INDORSER—ISSUES—MOTION. Action against indorsers to recover \$466.37 and interest, due on a promissory note. Under the pleadings the only issues for the jury were as to presentation, demand, refusal to pay, and notice. The verdict of the jury was: "We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at the sum of \$294.50." The plaintiff moved for judgment for the amount of the note and interest, which motion was denied, and judgment was entered for the amount named in the verdict. *Held*, the plaintiff was entitled to his motion. The jury had nothing to do with matters not in issue, and a verdict referring to such matters is, so far, surplusage. So far as the verdict related to matters in issue, it was in favor of plaintiff. The Court should have computed the amount due on the note for principal and interest, and rendered judgment accordingly.

Appeal from Superior Court, Sacramento County.

D. S. Taylor, for appellant.*Freeman & Bates*, for respondents.

By the COURT:

This was an action against indorsers to recover the amount due for the principal and interest of a promissory note. The answer denied the presentation of the note to the maker, the demand of payment, the refusal to pay, and notice of presentation, demand and refusal. There was no denial of the execution or indorsement of the note, and no plea of payment. There was, therefore, no issue to go to the jury except as to presentation, demand, refusal to pay, and notice. The jury returned a verdict in the following form: "We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at the sum of \$294.50." The plaintiff moved for judgment for the amount of the note and interest, which motion was denied, and judgment was entered for the amount named in the verdict. The plaintiff was entitled to his motion. The jury had nothing to do with matters not in issue, and a verdict referring to such matters is, so far, surplusage. So far as the verdict related to matters in issue, it was in favor of plaintiff. The Court

should have computed the amount due on the note for principal and interest, and rendered judgment accordingly.

Judgment vacated and cause remanded, with instructions to make computation and render judgment in accordance with this opinion.

DEPARTMENT No. 2.

[Filed December 6, 1882.]

No. 8693.

VALLEARE, PETITIONER,

VS.

HALSEY, JUDGE, ETC., RESPONDENT.

STATEMENT—TRIAL—REPORTER'S NOTES—MANDAMUS—APPEAL—PRACTICE.

Writ of mandamus to compel respondent to settle a statement on appeal denied, because the proposed statement is made up of the reporter's notes taken at the trial and written out in long-hand.

Mandamus.

Severance, Travers & Hornblower, for petitioner.
Chadbourne, for respondent.

By the COURT:

This is an application for a writ of mandamus to compel the respondent, who is a Judge of the Superior Court of the city and county of San Francisco, to settle a statement on appeal to this Court. Several reasons are assigned for the refusal of the Judge to settle the statement, only one of which will be noticed, as that is sufficient to sustain the respondent's action in the case.

The proposed statement is made up of the reporter's notes taken at the trial and written out in long-hand.

This is not the proper manner in which a bill of exceptions or statement on appeal should be prepared, and we will not sanction such a practice. It has been justly condemned in several cases, (*People vs. Getty*, 49 Cal. 584; *Caldwell vs. Parks*, 50 id. 502,) and this case comes within the rule therein laid down.

Writ denied.

IN BANK.

[Filed November 28, 1882.]

No. 8023.

PEOPLE, APPELLANT, vs. STEPHENS ET AL., RESPONDENTS.

WATER—CONSTITUTION. The argument of counsel that, "under the provisions of the present Constitution, no company or individual possesses the right to lay pipes in the streets of any incorporated city or town of the State, for the purpose of supplying the inhabitants thereof with fresh water, until the Legislature has prescribed the terms and conditions under which all this may be done." *Held*, untenable. (Art. XI, Sec. 19; Art. XIV, Secs. 1 and 2.)

ID.—CITY—TOWN. The word "city" used in Section 19 of Article XI includes towns.

ID.—MUNICIPALITY. The provisions of the Constitution requiring the rates or compensation to be fixed has no application to water furnished by a municipality itself.

ID.—ID. The rates or compensation required to be fixed by Section 1 of Article XIV are the rates or compensation to be collected for water authorized to be introduced by Section 19 of Article XI, and the latter section secures to individuals and to corporations duly incorporated for such purpose, under and by authority of the laws of the State, the right to introduce water into the classes of municipalities that by Section 19 of Article XI are given the right to fix the rates or compensation for its use; that is to say, cities, towns, and cities and counties. This construction brings the several sections into harmony, and gives effect to the evident purpose of the Constitution.

Appeal from Superior Court, Yolo County.

Hart, Wilson, and Treadwell, for appellant.

Sprague and Craig, for respondents.

Ross, J., delivered the opinion of the Court:

The gist of the very able argument of appellant's counsel is that, under the provisions of the present Constitution, no company or individual possesses the right to lay pipe in the streets of any incorporated city or town of the State for the purpose of supplying the inhabitants thereof with fresh water, until the Legislature has prescribed the terms and conditions under which all of this may be done.

Prior to the adoption of the present Constitution the Legislature had that power. It could delegate to the municipal government, or itself exercise, the power of prescribing the terms and conditions upon which pipes might be laid and water furnished. The privilege lay only in grant from the Legislature, which might be, and which experience showed had been, abused. As with many others, in dealing

with this subject the framers of the Constitution of 1879 determined to, and did make, many radical changes from the pre-existing condition of things. They enacted several provisions in relation to the subject to be considered, all of which must be taken and read together, and to each of which effect must be given. Those provisions are:

"Article XI, Section 19 * * * In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.

"Article XIV, Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided*, that the rates of compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the Board of Supervisors, or City and County, or City or Town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the matter that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town, in this State, otherwise than as so established, shall

forfeit the franchises and water works of such person, company, or corporation, to the city and county, or city or town, where the same are collected, for the public use."

"Art. XIV, Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Now, these provisions, as well as all other provisions of the Constitution, must receive a practical common-sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change. If the framers of the instrument had intended to leave the matter where it previously rested—in the hands of the Legislature—they would have said so in appropriate language. But it is perfectly evident that there were some things in regard to the subject that they were unwilling to trust to the Legislature. It was not with the view of "liberating the great public uses of water and gas from legislative control, and making them independent of the State," that the changes were made, but, on the contrary, it was intended, in certain enumerated respects, to lay a stronger hand upon them than that of the Legislature—to wit, the hand of the Constitution itself. So it was that, by Section 1 of Article XIV, the use of all water heretofore or hereafter appropriated for sale, rental, or distribution, is expressly declared to be a public use. It is not left to the Legislature, as formerly, to say whether it shall be a public use or not, but the Constitution itself declares it to be such, and then makes the use subject to the regulation and control of the State; that is to say, of the Legislature, in the manner to be prescribed by law, to wit, by statute law, subject, however, to certain enumerated provisions contained in the Constitution itself; among them, to provisions in respect to the rates or compensation to be collected by any person, company or corporation for the use of water supplied to any city and county, or city and town, or the inhabitants thereof. Such rates or compensation the Constitution expressly declares shall be fixed in a certain specified manner, at a certain time, and by a certain body, and the body failing to do so is expressly made "subject to peremptory process to compel action, at the suit of any party interested, and liable to such further processes and penalties as the Legislature may prescribe." But by the next section of the same article of the Constitution, the right to collect the rates or compensation so entitled is declared to

be a franchise, " and cannot be exercised except by authority and in the manner prescribed by law—that is, by statute law. But, of course, the Constitution contemplated the enacting by the Legislature, where they did not exist, of all laws necessary to give effect to its commands, and that none should be passed in contravention of its provisions. When, therefore, the Constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any city and county, or city or town, or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law, it was the duty of the Legislature, if they did not exist, to provide the needful laws. But the failure of the Legislature to do so, if failure there was, could not prevent the establishment of the rates or compensation specifically required to be established by the Constitution. And so with respect to the privilege granted by Section 19 of Article XI of the Constitution, of laying pipes in the public streets and thoroughfares of any city (where there are no public works owned and controlled by the municipality) so far as may be necessary for introducing into and supplying such city and its inhabitants with gas or other illuminating light, or with fresh water. That privilege is expressly granted by the section of the Constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity of damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in, and became a part of, the Constitution: "It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water, or either. I think, then, the objection that was taken to the section as formerly introduced was well taken—that it should not be limited to corporations; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, and it prevents monopoly in any sense. It also provides that the city authorities may make a regulation in relation to damages and indemnity; that is, that they may make a regulation requiring all work to be done under the supervision of the Superintendent of Streets, and, also, if any damage should be likely to occur,

they may, by security or otherwise, guard against it. * * * Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and for the water. This is also a necessary regulation, I think, against the abuses of monopoly. Now in Los Angeles we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purpose of supplying the city and competing with this company, but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty years to come. Now I submit to the convention that this is a great abuse of public authority, and that it ought to be corrected. We have also there a water company that claims the monopoly, and the private individual who did succeed in laying down pipes, and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions; and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessities, and then we will have some company peddling it by the tin-cupful. It is time this abuse was corrected, and, therefore, I offer this amendment"—which "amendment" is the clause of the Constitution now under consideration. (Debates Cons. Con., Vol. II, p. 1075.)

We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the Constitutional Convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it. Yet we are asked to hold, in effect, that, after all, the whole matter rests where it did before—with the Legislature. This we cannot do. Nor under our construction of the provisions in question, do we discover any indication of a return "to the doctrine of the Dartmouth College case," nor any fostering of monopolies, but, on the contrary, the most manifest intent to *prevent* them as respects the important subjects treated of—gas and water. By the adoption of those provisions the people asserted their unwillingness to leave the entire subject in the hands of the Legislature, and in the particulars already indicated, declared the rule that should govern, in the organic law itself, and gave to the Legislature the "regulation and control" in all other respects.

It is also claimed on the part of the appellant that the word "city," used in Section 19 of Article XI, *supra*, does

not include towns, and therefore does not apply to the town of Woodland. But in this position, also, we are unable to agree with the learned counsel for appellant. As already said, all of the provisions of the Constitution above quoted must be taken and read together. Indeed, this is conceded by counsel. Now, Section 1 of Article XIV provides that the rates or compensation to be collected by *any person, company, or corporation* in this State, for the use of water supplied to any *city and county, or city or town*, or the inhabitants thereof, shall be fixed, etc.

Is it not too plain for argument that the rates or compensation required to be fixed by this provision of the Constitution are the rates or compensation to be collected by the individual or corporation introducing water "in any city where there are no public works owned and controlled by the municipality," as provided by Section 17 of Article XI?

That the provision of the Constitution requiring the rates or compensation to be fixed has no application to water furnished by a municipality itself is conclusively shown by the concluding clause of the provision, which is in the words: "Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use." It would be absurd to say that the Constitution meant to provide for the forfeiting of the water works of a city and county or city or town to itself. We think it clear that the rates or compensation required to be fixed by Section 1 of Article XIV are the rates or compensation to be collected for water authorized to be introduced by Section 19 of Article XI, and that the latter section secures to individuals and to corporations duly incorporated for such purpose under and by authority of the laws of the State the right to introduce water into the classes of municipalities that by Section 19 of Article XI are given the right to fix the rates or compensation for its use—that is to say, cities, towns, and cities and counties. This construction brings the several sections into harmony, and gives effect to the evident purpose of the Constitution.

Other points are made which need not be noticed in detail.

Our conclusion is that the judgment and order ought to be affirmed, and it is so ordered.

We concur: Myrick, J., Morrison, C. J., Sharpstein, J.

We dissent: McKinsty, J., McKee, J.

IN BANK.

[Filed November 23, 1882.]

No. 6888.

ROBERTS, RESPONDENT, VS. COLUMBET, APPELLANT.

LAND LAW—SCHOOL LANDS—LOCATION—ACT OF 1852—ACT OF JULY 23, 1866—SALE OF UNSURVEYED LANDS—RATIFICATION—PATENT—EJECTMENT. Ejectment. Plaintiff claims title under a State patent issued in 1875, upon an application made with a school land warrant in 1874. Defendant claims under a State 500,000-acre school land warrant location made in 1853, under the Act of 1852 (Stats. 1852, p. 41), providing for the disposal of the 500,000 acres donated to the State by Act of Congress of 1841. In 1866 the land was surveyed by the United States, in 1867 selected and located, and in 1870 listed to the State in part satisfaction of the 500,000-acre grant. *Held*, defendant had the better title, and could defend thereon in this action of ejectment under a general denial to plaintiff's complaint.

ID.—ID. In disposing of unsurveyed lands the State incurred the obligation to convey to the locators the title to the lands located by them, in the event of the same being thereafter listed to the State.

ID.—ID. The Act of May 3, 1852, amounted to a contract between the State and any person who in accordance with its provisions located a school land warrant upon any Government land before the same had been surveyed. The State undertook and promised for a consideration to convey to such locator the land upon which he located his warrant, if the United States should at any time thereafter convey such land to the State.

ID.—ID. Such a contract by the State is construed precisely as it would be if both parties were private persons.

ID.—ID. *Hastings vs. Devlin*, 40 Cal. 345, distinguished.

ID.—ID. In this case the State made the selection and disposed of the land to the defendant, a purchaser in good faith, before the passage of the Act of Congress of July 23, 1866, confirming to the State lands so selected and disposed of by it. And it does not appear that at the date of the passage of said Act there was any claim to the land adverse to that of the defendant.

ID.—ID. The intention of Congress was to confirm the disposition which the State had made of lands to purchasers in good faith, under her laws. It vested in those who had prematurely purchased from the State, lands donated to it by the United States, the legal title to such lands.

ID.—ID. Sections 2 and 3 of the Act of July 23, 1866, do not in any way qualify the first clause of Section 1. The confirmation contained in the first section is not made to depend upon a compliance with any of the provisions of the sections which follow it. The latter simply point out the methods by which the State may have the land listed to it by the Commissioner of the General Land Office. But it is nowhere enacted that neglect or failure to comply with those provisions shall in any way affect the grant contained in the first section.

ID.—ID. If the grant by Congress to the State became absolute as soon as the State made a selection in such manner as the Legislature directed that it should be made, and the grant by the State became absolute as soon as the locator of the warrant had fully complied with the requirements of the Act of May 3, 1852, the first purchaser in such

a case would become vested with a prior title, which he might avail himself of under a general denial in an action of ejectment, even against a patent issued to a subsequent purchaser. And since the passage of the Act of July 23, 1866, the position of the defendant has been essentially the same as it would have been if the land upon which he located his warrant had been before the date of such location surveyed by the United States.

Appeal from Twentieth District Court, Santa Clara County.

Moore, Laine & Lieb, for appellant.

McKisick & Rankin, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

Ejectment. The plaintiff claims title to the demanded premises under a State patent issued to him September 17, 1875, upon an application made by him December 1, 1874.

The defendant claims under a State 500,000-acre school land warrant location, made in October, 1853, under an Act of the State Legislature, approved May 1, 1852, providing for the disposal of the 500,000 acres of land donated to the State by the United States.

The land was not surveyed by the United States until 1866, and in 1867 the proper agent of the State selected and located the demanded premises (and other lands), in part satisfaction of the 500,000-acre grant made to the State by the Act of Congress, which land was listed to the State by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, in 1870.

If the land in controversy had been surveyed by the United States prior to the location of the school land warrant under which the defendant claims, it does not seem to us that his title could be seriously questioned. But it is claimed on behalf of respondent that the purchasers of school land warrants from the State were only authorized "to locate the same upon any vacant and unappropriated lands belonging to the United States within the State of California *subject to location*," and that unsurveyed lands of the United States were not "subject to location."

That the Act of Congress granting 500,000 acres of land to the State did not authorize it to select any land which had not been surveyed by authority of the United States, is not controverted. And yet the Act of the Legislature of May 3, 1872, did provide for the location of school land warrants upon Government lands before the same had

been surveyed by the United States, and for the issuance of patents, in such manner and form as the Legislature might thereafter direct, to those who so located any of said warrants.

As against the United States, the locators of school land warrants upon surveyed or unsurveyed lands acquired no rights before the land upon which they located their warrants was listed to the State. The United States dealt with the State only. So that the only question in this case is what, if any, right the appellant acquired to the land in controversy as against the State, and those who claim under it, by virtue of a location made subsequently to that under which he claims.

The donation by Congress to the State was of 500,000 acres of land to be selected from lands of the United States after the same had been surveyed by its authority. Instead of waiting for such survey to be made, the State proceeded to select and dispose of lands which had not been so surveyed. By so doing the State undertook to dispose of land to which it had not acquired, but to which it expected to acquire, the title from the United States. The only obligation which the State thereby incurred, if any, was to convey to such locators the title to the lands located by them, in the event of the same being thereafter listed to the State.

The Act of May 3, 1852, not only provided for the location of school land warrants upon unsurveyed lands of the United States, but provided for the issuance of patents to such locators, after the lands embraced within their locations had been surveyed by the United States. Unless that Act contravened some law of the United States, it amounted to a contract between the State and any person who, in accordance with its provisions, located a school land warrant upon any Government land before the same had been surveyed. In other words, the State undertook and promised for a sufficient consideration to convey to such locator the land upon which he located his warrant, if the United States should at any time thereafter convey such land to the State. We are unable to discover any reason why the State could not make such a contract. And if it could, its contract with a private person must be construed precisely as it would be if both parties were private persons. (*Davis vs. Gray*, 16 Wall. 203; *Hall vs. Wisconsin*, 13 Otto 5.)

In the case before us, the State in 1852 sold a school land warrant which in 1853 was located upon the land sued for in this action. In 1866 said land was surveyed by the United States, and in 1870 listed to the State in part satisfaction of

the 500,000-acre grant. In 1874 the respondent made application to purchase said land with a school land warrant, and said application was approved by the Surveyor-General, and in pursuance thereof a patent was issued to respondent in 1875. Both purchases were made with school land warrants—one in 1853 and the other in 1874. The first was made in strict conformity with the provisions of a statute of the State then in force. But it is claimed that that statute, so far as it provided for the disposition of any part of the 500,000-acre grant before such part had been surveyed by the United States, was void.

And this position is supported by the cases of *Hustings vs. Devlin*, 40 Cal. 345; *Hastings vs. Jackson*, 46 Cal. 243; *People vs. Jackson*, filed June 16, 1881. And although this question was not necessarily involved in *Terry vs. Megerly*, 24 Cal. 609, *Megerly vs. Ashe*, 27 Cal. 322, *Grogan vs. Knight*, 27 Cal. 516, *Smith vs. Athearn*, 34 Cal. 506, *Collins vs. Bartlett*, 44 Cal. 371, or *Churchill vs. Anderson*, 53 Cal. 212, there are expressions to be found in each of them which indicate that the views of the Court were then in harmony with the decision in *Hustings vs. Jackson*, *supra*.

But we think this case distinguishable from *Hastings vs. Devlin*, *supra*. In that case both locations were made prior to the passage of the Act of Congress of July 23, 1866, entitled, "An Act to quiet land titles in California," the first section of which provides: "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any Act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State."

In that case there had been a *valid* location as well as an *invalid* one made upon the land before the passage of said Act. Congress could not, and did not, attempt to invalidate valid sales made by the State prior to the passage of said Act. It simply confirmed to the State lands which had been previously selected by the State and disposed of by it to purchasers in good faith. If a valid selection and sale had been made before the passage of that Act, the title of the purchaser in good faith required no confirmation, and could not be affected by any Act of Congress or of the State Legislature. This is too clear to admit of argument, and illustrates the difference between that case and this. In this case the State made the selection and disposed of the land to the appellant, a purchaser in good faith, before the passage of the Act

confirming to the State lands so selected and disposed of by it. And it does not appear that at the date of the passage of the Act of July 23, 1866, there was any claim to the land adverse to that of the appellant herein. So that the appellant was in a position to reap the full benefit which that Act conferred upon purchasers who, prior to the passage of said Act, had purchased in good faith, of the State, lands donated to it by the United States.

The question upon which the decision of the case must turn is whether the appellant is in a position to defend his right of possession as against the respondent in an action of ejectment, under an answer containing nothing more than a general denial. If the legal title to the demanded premises had vested in the appellant before the commencement of the action, he could have shown that fact under the general denial.

The Act of Congress to which we have referred characterizes the transaction between the State and the appellant as a disposition of the land in controversy by the former "under her laws," to the latter. Congress in that Act treats the lands to which it refers as *disposed* of by the State, and confirms and ratifies that disposition. Was not that sufficient to vest the legal title in the appellant? At the date of the passage of that Act of Congress the title was undoubtedly in the United States. But the State "under her laws" had "disposed of the same" to a purchaser "in good faith," and Congress in effect said to the State, "Inasmuch as you have done this, the United States will confirm said land to you."

The provision of the Act of Congress is not so clearly worded as it might have been, but the intention, obviously, was to confirm the disposition which the State had made of lands to purchasers in good faith under the laws. And we must construe it according to the intention of Congress. And thus construed, it doubtless vested in those who had prematurely purchased from the State lands donated to it by the United States, the legal title to such lands.

In the Act of July 23, 1866, Congress starts out with the declaration "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any Act of Congress, and has *disposed* of the same to *purchasers in good faith under her laws*, the lands so selected shall be and hereby are confirmed to said State." The intention clearly was to place the purchaser in the same position that he would have occupied if the State, at the time of his

purchase, had held the title to the land purchased. And this view is strengthened by a clause in the third section of the Act, where such a purchaser is referred to as "the holder of the State title."

Sections 2 and 3 of the Act do not in any way qualify the first clause of Section 1. The confirmation contained in the first section is not made to depend upon a compliance with any of the provisions of the sections which follow it. The latter simply point out the methods by which the State may have the land listed to the Commissioner of the General Land Office. But it is nowhere enacted that neglect or failure to comply with those provisions shall in any way affect the grant contained in the first section.

The case as presented by the record now before us is substantially as follows: By the Act of Congress of September 4, 1841, 500,000 acres of land were granted to the State, to be selected "in such manner as the Legislature thereof" should direct. And the Legislature in the Act of May 3, 1852, directed in what manner such lands should be selected, and the land in controversy was selected and sold to the appellant in strict conformity to the provisions of said last-mentioned Act. If the land so selected and sold had been surveyed by the United States, but not listed to the State, prior to such selection and sale, could the purchaser in possession under an answer containing a general denial only, have availed himself of these facts as a defense in an action of ejectment brought against him for the recovery of the possession of the same land by one who had purchased the same from the State and received a patent therefor, after such land had been listed to the State under a selection made subsequently to that under which the first locator purchased? If the grant by Congress to the State became absolute as soon as the State made a selection in such manner as the Legislature directed that it should be made, and the grant by the State became absolute as soon as the locator of the warrant had fully complied with the requirements of the Act of May 3, 1852, it does seem to us that the first purchaser in such a case would become vested with a prior title which he might avail himself of under a general denial in an action of ejectment even against a patent issued to a subsequent purchaser. And since the passage of the Act of July 23, 1866, we think that the position of the appellant has been essentially the same as it would have been if the land upon which he located his warrant had been, before the date of such location, surveyed by the United States.

Judgment reversed, with directions to the Court below to enter judgment in favor of defendant upon the findings.

We concur: Thornton, J., McKinstry, J., Morrison, C. J.

We dissent: Myrick, J., McKee, J., Ross, J.

IN BANK.

[Filed November 23, 1882.]

No. 6582.

ST. HELENA WATER COMPANY, RESPONDENT,

VS.

FORBES, APPELLANT.

WATER—RIPARIAN PROPRIETOR—CONDEMNATION—EMINENT DOMAIN—EASEMENT. The right of a private individual to enjoy the flow of water in its natural channel upon or along his land can be taken from him under the law of eminent domain, for the purpose of supplying the inhabitants of a town with water.

1D.—INJUNCTION. In response to the suggestion that the proceedings taken in this case were in violation of an injunction previously obtained for diversion of the water, *held*, the present plaintiff was not a party to the suit in which the injunction was awarded; besides, the right here asserted is to take the water upon making just compensation therefor.

Appeal from Seventh District Court, Napa County.

McAllister & Bergin, for appellant.

B. S. Brooks and Stanly, Stoney & Hayes, for respondent.

Ross, J., delivered the opinion of the Court:

The plaintiff is a corporation organized under the laws of this State for the purpose of supplying the inhabitants of the town of St. Helena with fresh water. The defendant is the owner of a tract of land through which runs the waters of a certain creek called Hudson or York creek.

The purpose of the present proceeding on the part of the plaintiff is to condemn the waters of the creek for the purpose of supplying the inhabitants of the town with water; and the principal question in the case is, whether or not under the laws of this State the right of a private individual to enjoy the flow of water in its natural channel, upon or along his land, can be taken from him for such purpose.

There can be no sort of doubt that the supplying of the inhabitants of a town with pure fresh water is one of the "public uses" in behalf of which the Legislature has declared the right of eminent domain may be exercised. (Code

of Civil Procedure, Sec. 1238.) Whether, with such declaration, the Courts can in any case interfere, need not now be determined, since it is very clear that we would not be justified in holding that the supplying of the inhabitants of a town with pure fresh water is not a public use.

It is equally clear that the plaintiff is authorized to exercise the right of eminent domain in behalf of such use. Section 1001 of the Civil Code provides: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the State,' or 'a person in charge of' such use, within the meaning of those terms, as used in such title."

The only question about which we have had any serious doubt is whether the statute authorizes the condemnation of the particular kind of property here sought to be taken.

Section 1240 of the Code of Civil Procedure defines the property which is made subject to the exercise of the rights of eminent domain, and Section 1239 classifies the estates and rights in lands subject to be taken for public use, as follows:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

"2. An easement, when taken for any other use.

"3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use."

It is sufficiently obvious, we think, that the property in question comes within the category of real property. "The rights of riparian proprietors," says Mr. Washburn in his work on Easements and Servitudes, pp. 276-7 (215), "though coming under the head of what are called 'Natural Easements,' are not, in fact, the result of any supposed grant, evidenced by long acquiescence on the part of a superior proprietor, of the flow of the water from his land to the land below. The right of enjoying this flow, without disturbance or interruption by any other proprietor, is one *jure naturæ*, and is an incident of property in the land, not an appurte-

nance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring land-owner."

"It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as *parcel*," said Chief Justice Shaw, in *Johnson vs. Jordan*, 2 Metc. 234. (See, also, Angell on Water-courses, Sec. 141; *Brace vs. Yale*, 10 Allen, 443; Civil Code, Sections 14, 658, 662.)

The water, therefore, that runs over the defendant's land, is a part and parcel of his land. The Legislature has said that "an easement" in land may be taken for such public use as is here involved. Does this mean only an easement owned by the person against whom the right to condemn is asserted? We think not. As no man can have an easement in his own land, it would be only such easements as he might own in lands of others, that would be subject to be taken for public use, under such a construction of the statute as that. Yet the statute subjects all real property belonging to any person to the right of eminent domain, to be exercised in the cases and for the purposes therein stated. In other words, it authorizes the fee simple of all real property belonging to any person to be taken, when needed, for any of the public uses enumerated in subdivision 1 of Section 1239, and an easement in all real property belonging to any person, to be taken when needed for any other public use. The question remains: By taking the water that, in its natural channel, runs over the defendant's lands, does the plaintiff take an easement in the lands of defendant? If the defendant should sell to the plaintiff the right thus to divert the water, there can be no doubt that he would sell an easement in his land. (*Owen vs. Field*, 102 Mass. 90; *Amidon vs. Harris*, 113 Id. 59; *Wolfe vs. Frost*, 4 Sanford, 72; *Carey vs. Daniels*, 5 Met. 236.) And if the plaintiff, by adverse use, should acquire the right, it is equally clear that the interest so acquired would be an easement in the land of the defendant. "In many cases," says Mr. Washburn in his work on "Real Property," Vol. 2, Ch. 1, top p. 321, "one land-owner may acquire a right to apply the use of water upon his own lands so as essentially to impair its use by other proprietors, above or below him, and even to interfere thereby with the enjoyments of the land of another; as for instance, by stopping the water of a stream in his own land, and flowing back the same upon the land of a proprietor above him; or diverting it so as to water it, or prevent its reaching the land of a proprietor below him in its natural quantity. A right thus to interfere with the natural right to

make use of water belonging to another where it is connected with the occupation of land, would constitute an easement in favor of the latter, as the dominant estate. Such an easement may be acquired like other easements, by grant or by an adverse enjoyment so long continued as to raise a legal presumption of a grant." (See, also, Wood on Nuisances, Sections 353, 354, 374; Angell on Water-courses, Section 141.)

If there is any difference in the nature of the same right when acquired by condemnation proceedings, we are unable to perceive it.

In response to the suggestion that the proceedings taken in this case are, in effect, a violation of an injunction previously obtained by the defendant in respect to the same water, it is sufficient to say that the present plaintiff was not a party to the suit in which the injunction was awarded, and, besides, the right here asserted is to take the water upon making just compensation therefor.

Upon proof made the Court below found all of the facts essential to authorize the taking.

We must affirm the judgment and order. So ordered.

We concur: Morrison, C. J., Sharpstein J.

CONCURRING OPINION.

As the right to have the water flow in the stream to defendant's land is an incorporeal hereditament appertaining to his land, and is, therefore, real property, and as all real property of an individual, or such interest therein as may be necessary, may be taken, by the right of eminent domain, in behalf of canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, etc., the taking of the water from the stream, above the land of defendant, is a taking of an interest in real property in behalf of a public use. The land through, over, and upon which pipes, aqueducts, flumes, and ditches may be constructed or laid is not used by the public; the corporation uses the land for the conveying of water; the water, after having been conveyed, is taken by the public, and at that point, strictly speaking, is where the public use commences; but both the water and the land are taken, to the end that the public may be supplied with the one by the use of the other. In this case, the plaintiff has already acquired the one, viz., places for its pipes, etc., (which are worthless, and serve no purpose without water,) and now it seeks to acquire the necessary water, such water, when acquired, to be used

in behalf of, for the benefit of, to the interest of, for the behoof of, ditches, etc., for conducting water for the use of the inhabitants of a village. [See Worcester's Dictionary, "behalf."] MYRICK, J.

I concur in the judgment: Thornton, J.

We dissent: McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed November 22, 1882.]

No. 7454.

ROSENKRANZ, APPELLANT,

VS.

WAGNER ET AL., RESPONDENTS.

MECHANIC'S LIEN—COMPLAINT—PLEADING—FINDING. The Court found that defendants were notified orally and in writing that plaintiff had performed work, for which he claimed \$60, *before* defendants made a payment to the contractor. *Held*, the finding is without the issues made by the pleadings. The complaint fails to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had any knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under his contract.

ID.—ID. The complaint contains no statement of a cause of action. (*Renton vs. Conley*, 49 Cal. 187; *Wells vs. Cahn*, 51 id. 423; *Dingley vs. Greene*, 54 id. 333.)

Appeal from Superior Court, San Francisco.

J. M. Wood, for appellant.

T. F. Batchelder, for respondents.

By the COURT:

The Court below found, as a fact, defendants were notified orally and in writing, that plaintiff had performed work, etc., for which he claimed \$60.18, *before* defendants made the payment of \$500 to the contractor.

The finding is entirely without the issues made by the pleadings. The complaint fails to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had any knowledge of the claim of plaintiff, prior to the payment in full of the amount due to the original contractor under his contract.

The complaint contains no statement of a cause of action. (*Renton vs. Conley*, 49 Cal. 187; *Wells vs. Cahn*, 51 id. 423; *Dingley vs. Greene*, 54 id. 333.)

Judgment affirmed.

DEPARTMENT No. 2.

| Filed November 2, 1882. |

No. 8610.

PIERCE, APPELLANT,

VS.

HYDE AND GOVE, RESPONDENTS.

SUBROGATION—LIEN—DECREE—MORTGAGE—SURETY. Defendants, Hyde and Gove, being the owners of a certificate of purchase from the State for the disputed premises, transferred it to plaintiff as security for a note of defendant *Hyde*. Plaintiff paid the balance of the purchase money to the State and received a patent. The taxes paid by plaintiff, interest, the payment to the State, and the note, left due him \$1,739, which amount had been tendered. Before the tender, plaintiff had purchased Hyde's interest in the land under a judgment on a cause of action other than the note above referred to. The action in hand was to quiet title; a cross-complaint was filed by defendants, charging plaintiff as mortgagee, and setting up the tender. The Court below decreed that plaintiff held the title in trust for defendants; that upon payment to him by defendants of \$1,739 he execute a deed, etc., and deliver up the patent. *Held*, on appeal: It does not appear from the pleadings or from the evidence how much of the money offered to be paid on behalf of defendants to plaintiff was on behalf of the defendant Gove, surety, nor how much on behalf of the defendant Hyde, principal. If the money was tendered on behalf of Hyde, plaintiff would be entitled to the benefit of his purchase under the execution sale; and if the money, or any part of it, was tendered on behalf of the defendant Gove, she would be entitled to be subrogated to plaintiff's position as against Hyde and have a lien, superior to the execution sale, on the Hyde share of the land to secure her for the money paid by her to relieve her interest from Hyde's debt. In either event, plaintiff would be entitled to retain the Sheriff's certificate, and any title he might have acquired thereby, to the extent of any surplus of the Hyde interest above the holding of the defendant Gove harmless of Hyde's debt.

Id.—Id. If the decree for the conveyance by plaintiff had been confined to the interest of the defendant Gove, the plaintiff could not have objected; but as the case is presented, the decree would deprive plaintiff of a legal right.

Id.—Id. From the uncertainty apparent as well in the pleadings as in the findings, it is impossible to direct any particular judgment to be entered.

Appeal from Superior Court, Santa Barbara County.

George A. Nourse, for appellant.

J. C. Bates, for respondents.

By the COURT:

It does not appear from the pleadings or from the evidence in this case how much of the money offered to be paid on behalf of the defendants to plaintiff was on behalf of the defendant Gove, nor how much on behalf of the defendant Hyde. If the money was tendered on behalf of Hyde, doubtless plain-

tiff would be entitled to the benefit of his purchase under the execution sale; and if the money, or any part of it, was tendered on behalf of the defendant Gove, she would be entitled to be subrogated to plaintiff's position as against Hyde, and have a lien, superior to the execution sale, on the Hyde share of the land, to secure her for the money paid by her to relieve her interest from Hyde's debt. In either event plaintiff would be entitled to retain the Sheriff's certificate and any title he might have acquired thereby, to the extent of any surplus of the Hyde interest above the holding of the defendant Gove harmless of Hyde's debt.

If the decree for the conveyance by plaintiff had been confined to the interest of the defendant Gove, the plaintiff could not have objected; but as the case is presented to us, the decree as it is would deprive plaintiff of a legal right. From the uncertainty apparent as well in the pleadings as in the findings, it is impossible for us to direct any particular judgment to be entered. The judgment is therefore reversed and the cause is remanded for a new trial, with instructions that the parties may be permitted to amend their pleadings, if so advised. In the absence of an ascertainment as to whose money was offered to be paid, we do not see how a judgment can be entered which shall definitely protect the interests of the defendant Gove.

It may be added, that the commercial value of the land is not for consideration. The plaintiff, in causing Hyde's interest to be sold on the execution, had the right to place his own estimates of value, and to determine for himself whether there would be an ultimate balance in his favor.

DEPARTMENT No. 1.

[Filed November 21, 1882.]

No. 7471.

LANG, RESPONDENT, vs. SPECHT ET AL., APPELLANTS.

TRANSCRIPT — PRINTING — SERVICE — APPEAL — RULES — SUPREME COURT.

Under Rule 10 of the Supreme Court it has been the uniform practice, where the written transcript has been transmitted to the clerk within the forty days fixed by Rule 2, or any extension of such period, to require only the service upon respondent mentioned in Rule 10, that is, service of copy of the transcript after the same has been printed under the direction of the clerk. The rules do not require, in such cases, service of the transcript before it is printed.

PROMISSORY NOTE—STATUTE OF LIMITATIONS. The note sued on was executed in the State of Nevada, and there was no pretense that defendant S. openly visited California more than two years before the commencement of the action. *Held*, the Court below properly found against defendant upon the plea of the Statute of Limitations.

ID.—PLEADING—FINDING—SURETY—PAYMENT. The complaint alleged the execution of the note by defendants S. and K. as joint makers. It contained no statement of facts which would suggest that, as between themselves, K. was surety only for S., and that as such surety had taken up the note and assigned his right of action against his principal. It also alleged that the payees endorsed to plaintiff's endorers. The answer of S. averred payment of the note by K. The Court below found that K. signed the note as surety for S., but failed to find upon the issue of payment. *Held*, the findings—if they could be construed that K. as surety paid the note for the benefit of defendant S., and that he thereupon transferred his right to recover of defendant S. to plaintiff—would be utterly unsupported by the averments of the complaint and outside of the pleadings.

Appeal from Superior Court, San Francisco.

F. J. Custellum, for appellants.

J. C. Burch, for respondent.

T. C. Van Ness, of counsel, for appellants.

By the COURT:

Under rule ten of this Court it has been the uniform practice, where the written transcript has been transmitted to the clerk within the forty days fixed by rule two, or any extension of such period, to require only the service upon respondent mentioned in rule ten, that is, service of copy of the transcript after the same has been printed under the direction of the clerk. The rules do not require, in such case, service of the transcript before it is printed.

The note sued on was executed in the State of Nevada, and there is no pretense that defendant Specht openly visited California more than two years before the commencement of the action. The Court below properly found against defendant upon the plea of the statute of limitations.

The complaint alleges the execution of the promissory note by defendants Specht and *Kruttschnitt* as joint makers. It contains no statement of facts which would suggest that, as between themselves, *Kruttschnitt* was surety only for Specht, and that as such surety had taken up the note and assigned his right of action against his principal. The complaint alleges that the payees endorsed to plaintiff's endorers.

The answer of Specht avers *payment* of the note by *Kruttschnitt*.

The Court found that *Kruttschnitt* signed the note as surety for Specht.

There is no finding upon the issue of payment, nor any finding relating to the matter of payment, except the following: "I further find *that the payment made by Kruttschnitt & Co., was for the benefit of the defendant*" (the only de-

fendant served was Specht), "and that the payment was made by the firm of Kruttschnitt & Co., *in liquidation of the debt*, and that having paid the same as surety, *his assignee* is entitled to recover against his co-obligor, Margaret Specht, and that the assignment to John F. Lang, the plaintiff, was made in good faith and for a valuable consideration, and that he is entitled to judgment for one thousand two hundred and fifty-three dollars."

From the amount of the judgment it would appear that it was intended to allow for the amount paid to the payees or holders of the note by some party or parties with legal interest thereon. But, as we have seen, the action is brought on the note. If we read the finding in connection with the evidence to which it seems to refer, payment is found. But this cannot properly be done. Separated from the reference to "the payment made by Kruttschnitt & Co."—a payment not previously mentioned in the findings—and the proposition of law inserted into the finding, that Kruttschnitt & Co., "having paid the same *in liquidation of the debt*, *his assignee* is entitled to recover," there is certainly no direct finding that the note was not paid by Kruttschnitt, who was joint maker as to the payees. In brief, the findings, so far as they go, are strongly suggestive of a payment of the note by Kruttschnitt; they cannot possibly be construed as determining that Kruttschnitt did not pay the note.

The Court therefore failed to find upon the issue of payment.

The findings—if they could be construed to be that Kruttschnitt, as surety, paid the note for the benefit of defendant Specht, and that he thereupon transferred his right to recover of defendant Specht to plaintiff—would be utterly unsupported by the averments of the complaint and entirely outside of the pleadings.

Judgment and order reversed, and cause remanded for a new trial.

IN BANK.

[Filed November 23, 1882.]

No. 6229.

SANTA CRUZ RAILROAD COMPANY, APPELLANT,

vs.

THE COUNTY OF SANTA CRUZ, RESPONDENT.

COUNTY—SUPERVISOR—DAMAGES—BONDS. Plaintiff asked for damages sustained by reason of alleged failure to deliver county bonds. *Held*, the facts would not justify a judgment against the county. For a neglect or refusal to perform a duty imposed on him by law, a Supervisor is personally liable. (4086, Pol. Code.)

Appeal from Twentieth District Court, Santa Cruz County.

Chas. B. Younger, for appellant.

J. H. Logan, for respondent.

By the COURT:

The demurrer to the complaint was properly sustained. We see no such statement of facts in the complaint as would justify a judgment against the county. For a neglect or a refusal to perform a duty imposed on him by law, a Supervisor is by Section 4086, Political Code, made personally liable.

Judgment affirmed.

IN BANK.

[Filed December 11, 1882.]

No. 8527.

C. P. R. R. CO., PETITIONER,

VS.

THE SUPERIOR COURT OF TULARE COUNTY,
RESPONDENT.

PROHIBITION — REMOVAL OF CAUSE — TAXES — FEDERAL COURTS. Action brought in Superior Court to recover taxes. Defendant answered and also filed a bond and petition asking a removal of the cause to the Circuit Court of the United States, on the ground that the suit was one arising under the Constitution and laws of the United States, and claimed that upon the filing of such bond and petition the jurisdiction of the State Court ceased. The petition herein was for a writ of prohibition to stay the Superior Court from further trying the cause. *Held*, not a proper case for the issuance of the writ—a writ in the nature of a prerogative writ.

Prohibition.

Haymond and Brown, for petition.

Attorney-General Hart, for respondent.

By the COURT:

We are not satisfied that this is a proper case for the issuance of a writ of prohibition—a writ in the nature of a prerogative writ.

Writ denied and proceeding dismissed.

(Morrison, C. J., and Thornton, J., expressed no opinion.)

Pacific Coast Law Journal.

VOL. X.

DECEMBER 30, 1882.

No. 19.

Current Topics.

WOMAN AS JUDGE.

From the *Ohio Law Journal* we clip the following:

"The Countess of Pembroke was Sheriff of Westmoreland before the era of Magna Charta, and, being at that period a judicial officer, she held a Court and exercised the power of a subordinate Judge, and sat with the Judges on the bench at the Appleyby assizes. Eleanor was appointed to fill the office of lord keeper of England, and actually performed the duties of the lord chamberlain in person. King Henry III, in the year 1235, appointed her lady keeper of the great seal, which post she held for nearly a year, and performed all the judicial and ministerial duties.

"The Countess of Richmond, mother of Henry VIII, and Lady Bartlett, were both appointed justices of the peace, and a third lady, who was a magistrate, actually sat upon the bench at the assizes and sessions in the county of Suffolk. Various judicial inquiries respecting freehold property were, in the reign of Richard II, made before 'divers lords and ladies.' It is gravely stated by many old legal writers, whose opinions are entitled to respect, that women are disqualified to become arbitrators; but the better opinion now is that they may be so, on the ground that every person is entitled to select any person he likes for his Judge, and he cannot afterward object to the incompetency of those he has chosen to act as arbitrators on his behalf. The Duchess of Suffolk, in the reign of Edward IV, acted as arbitrator before she married, and the legality of her appointment and the exercise by her of this office were not disputed."

Supreme Court of California.

IN BANK.

[Filed December 12, 1882.]

No. 7884.

DANIELWITZ, RESPONDENT,

VS.

SHEPPARD ET AL., APPELLANTS.

ADMINISTRATION—CONTRACT BY ADMINISTRATRIX—COMMISSIONS—ESTATE OF DECEASED PERSON. The agreement sued on was made by the administratrix and heir of an estate with plaintiff, allowing the latter all over a certain amount at which property of the estate should be sold, in advance of a former bid, as commission, in consideration of plaintiff procuring a purchaser therefor. The plaintiff claimed that, by virtue of the agreement, he was entitled to the difference between the sums for which the property was subsequently sold; and he brought this action against Ann Sheppard and Jennie Sheppard as "heirs of the estate" of J. R. T. M. Sheppard, deceased, to recover that difference. *Held*, even if the agreement be treated as the individual contract of Ann and Jennie Sheppard, it is invalid. Neither of them had any power so to dispose of the proceeds of sale of the real property of the deceased Sheppard. That property could only be sold in the manner pointed out by statute, and all the money derived from its sale became assets of the estate, and subject to disposition only in accordance with law. The disposition contemplated by the terms of the agreement sought to be enforced in this action, of a portion of those proceeds, is unauthorized by any provision of the statute, and contrary to the policy of the law.

Appeal from Superior Court of San Francisco.

Tully R. Wise, for appellants.*Eugene Deuprey*, for respondent.

By the COURT:

J. R. T. M. Sheppard died in the city and county of San Francisco, leaving certain real estate therein. His widow, Ann Sheppard, was appointed administratrix of his estate, and afterward obtained an order directing certain of the real estate to be sold. One Regan bid therefor the sum of \$28,500, which bid was accepted by the administratrix, who made return of the sale, with an application on her part to the Court for confirmation thereof.

An existing statute declared: "Upon the hearing, the Court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the Court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent. more in amount than that named in the return be made to the Court in writing, by a responsible person, it is in the discretion of the Court to accept such offer and confirm the sale to such person, or to order a new sale."

In this condition of fact and law the following agreement in writing was entered into:

"SAN FRANCISCO, April 28, 1877.

"We hereby promise and agree to pay Isidor Danielwitz all the money in excess or over and above the sum of twenty-nine thousand and five hundred dollars (\$29,500), United States gold coin, for his services in the way of a commission for obtaining a purchaser for property sold on the 16th day of April, 1877, by order of the Probate Court of the City and County of San Francisco, belonging to the estate of John R. T. M. Sheppard, deceased. Said purchaser shall pay the sum of \$31,350 gold coin, or more; said sum being an advance of ten per cent., or more, as provided by law for said property so sold; the essence of this agreement being the payment to said Isidor Danielwitz of all sum or sums of money obtained or bid for such property sold as hereinafter described in excess of the sum of \$29,500, gold coin, irrespective of what said excess may be as the payment to him, said Danielwitz, in the procuring of such purchaser. Said property is described as follows: [Here follows the description of the property described in the complaint.] This agreement being made with said Danielwitz in good faith, and which we promise faithfully to carry out, as hereinbefore stated.

"ANN SHEPPARD,

"Administratrix of the estate of J. R. T. M. Sheppard, deceased.

"JENNIE SHEPPARD, Heir.

"Witnessed by R. B. Turner."

Afterward, to wit, on the 30th of April, 1877, the plaintiff procured one Corcoran to bid in writing for the property the sum of \$31,500. On the same day one McLeran put in an advance bid of \$34,500, and on the first of May following,

Corcoran bid the sum of \$37,000, for which last-named sum the property was sold and confirmed to him, and he thereupon paid to the estate that sum and received the administratrix's deed.

The plaintiff claims that, by virtue of the agreement above set forth, he is entitled to the difference between the sum of \$29,500 and the sum of \$37,000, for which the property was sold to Corcoran; and he brought this action against Ann Sheppard and Jennie Sheppard as "heirs of the estate" of J. R. T. M. Sheppard, deceased, to recover that difference.

Even if the agreement be treated as the individual contract of Ann and Jennie Sheppard, it is invalid. Neither of them had any power so to dispose of the proceeds of sale of the real property of the deceased Sheppard. That property could only be sold in the manner pointed out by statute, and all the money derived from its sale became assets of the estate, and subject to disposition only in accordance with law. The disposition contemplated by the terms of the agreement sought to be enforced in this action, of a portion of those proceeds, is unauthorized by any provision of the statute, and contrary to the policy of the law.

Judgment and order reversed.

IN BANK.

[Filed December 12, 1882.]

No. 6829.

MORENHAUT ET AL., APPELLANTS, VS. BELL, RESPONDENT.

DEED—CONTRACT—SALE—RESCISSION—MEXICAN LAW. On a former appeal in the case it was held that upon the execution of a deed of sale by Montenegro to Forbes, August 7, 1848, all the title that M. then held to the premises described in it passed to and vested absolutely in F. (42 Cal. 591). On this appeal, *held*: Conceding that under the Mexican law the sale might have been rescinded, after the execution of said deed, the finding of the Court below that it was not rescinded is sustained by the evidence, as are the findings upon all the other issues in the case.

Appeal from Fourth District Court of San Francisco.

B. S. Brooks, for appellants.

Oope & Boyd and *Wilson & Wilson*, for respondent.

By the COURT:

Under the execution of the deed of Montenegro to Forbes, August 7, 1848, "all the title that Montenegro then held" to the premises described in it, "passed to and vested absolutely in Forbes." (*Morenhaut vs. Barron*, 42 Cal. 591.)

The only question that is open for our consideration and determination on this appeal is, whether the sale from Montenegro to Forbes was subsequently rescinded. Conceding that under the Mexican law such sale might have been rescinded, after the execution of said deed, the Court below found as a fact that it was not, and we think that the findings of the Court upon that and all the other issues were justified by the evidence.

Judgment and order denying the motion for a new trial affirmed.

(Myrick, J., expressed no opinion.)

IN BANK.

[Filed December 9, 1882.]

No. 10,772.

PEOPLE, RESPONDENT, VS. HOPE, APPELLANT.

BURGLARY—BURGLARS' TOOLS—EVIDENCE. Defendant was charged with the burglary of Sather's Bank, San Francisco, and found guilty of an attempt to commit that crime. On appeal, *held*, the burglars' tools found over the bank vault and in defendant's trunk were properly admitted in evidence.

Id.—Id. The "cylindrical bar" might have been necessary for the witness to use in order to elucidate and illustrate clearly the character of the "coupling or sockets" which had been admitted in evidence.

Id.—WITNESS—NAME. The objection to a question put to the witness Aitken, as to a name defendant had given prior to the alleged offense, was properly overruled.

Id.—INSTRUCTIONS. The Court refused the instruction: "Before you can find the defendant guilty of the charge in the information (burglary), you must be entirely satisfied from the evidence that the defendant entered the house, etc., of Peder Sather, in the city and county of San Francisco, with the intent then and there to commit larceny;" but gave the following: "I instruct you that it is not sufficient for you to find that the defendant entered the house, etc., of Peder Sather, but in addition to such entry you must find that he entered with the intent to commit larceny therein, and if you do not so find you should acquit the defendant." *Held*, as there is no substantial difference between the instruction given and the one refused, the judgment could not be reversed for the refusal to give the instruction as asked by defendant.

Id.—Id. *Further:* Defendant was found guilty of an *attempt* to commit burglary, only, so that he could not have been prejudiced by the re-

fusal to give an instruction which contained a correct definition, not of the crime of which he was found guilty, but of a higher one.

ID.—ID. An instruction complained of, *held*, not liable to cause the jury to confound a preparation to commit the crime with an attempt to commit it.

ID.—ENTRANCE—TRAP-DOOR. An entrance effected through a trap-door leading from the second floor of the building to the vault located in that part of the building occupied by Peder Sather as a banking office, would constitute "an entry in the occupancy of Peder Sather." The trap-door would constitute "some internal communication between the closet on the second floor and the banking office on the first."

ID.—INFORMATION. Appellant presented the point that the information should have been set aside, as he had not been legally committed by a magistrate. *Held*, the question presented does not differ materially from that passed upon in *People vs. Smith*, 8 P. O. L. J. 248.

ID.—JUROR VISITING PREMISES—TRIAL. The bare fact of a juror having visited, during the trial, the premises where it was alleged defendant had committed the crime of burglary, *held*, no sufficient ground for discharging the jury.

Appeal from Superior Court, San Francisco.

Foots, Barham & Coogan, for appellant.

C. B. Darwin, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The question presented by the first point in appellant's brief, as we view it, does not differ materially from that upon which this Court passed in *People vs. Smith*, 8 Pac. C. L. J. 248, and we are satisfied with the views therein expressed.

We do not think that the bare fact of a juror having visited, during the trial, the premises where it was alleged that the defendant had committed the crime of burglary, was a sufficient ground for discharging the jury. From the facts before us we are unable to see how the case of the defendant could possibly have been prejudiced thereby.

For the purpose of proving that the defendant had burglariously entered the building described in the information, with the intent to commit larceny therein, witnesses were introduced by the prosecution who testified, in substance, that in consequence of the discovery of supposed indications of a design on the part of some person or persons to force an opening into the vault of the bank located in said building, certain police-officers had been stationed where they could readily detect any one who should enter said building on the night of the arrest of the defendant. One of said officers testified that about 9 o'clock P. M. he saw the defendant and another person enter said building;

and another officer who was stationed inside of the building testified that at about the same time he heard parties coming up the stairs in said building, and soon afterward he saw the defendant on the second floor of it, inside a door-way, leading to a closet, where he was arrested. This witness further testified that before he became aware of the entrance of any other persons than himself and two other officers, who had been stationed inside the building with him, he inspected the closets on the second floor, and found that the doors of them were locked. But that after the entrance of persons other than himself and said officers, he found the door of one of the closets "sprung open, and behind the door close to the partition * * * a large sledge-hammer, wrapped in paper, and also a handle wrapped in papers," which were not in the hall when the witness first inspected it. A further inspection of the premises revealed the following facts: In a closet over the bank vault a trap-door about two feet wide and two and a half feet long had been sawed out of the floor, and then fastened down with screws, so that it might be opened without making much, if any, noise. On opening it the witnesses found beneath it and on the top of the vault a large quantity of tools, and a hole in the vault of the depth of two feet, which had been made by the removal of bricks which had been deposited between the walls of the room and the vault. The tools found on the vault were adapted to the kind of work that was evidently being prosecuted upon it, and other tools of a similar character were found in the defendant's trunk in a room occupied by him in San Francisco. To the introduction of the tools found upon the vault, and to those found in the defendant's trunk, objections were made by the defendant's counsel. The objections were overruled and exceptions taken, upon which we are asked to pass.

"The implements found in the excavation over the vault," say the appellant's counsel, "were improperly admitted in evidence, because there was no evidence showing or tending to show that any of them belonged to or had been in the possession of the defendant, or were in any way connected with him." If such evidence was a necessary prerequisite to the introduction of the implements to which counsel refer, their exception was doubtless well taken. But these implements were not offered in evidence until the witness by whom they were discovered had testified, without objection, to the fact of having found implements of a similar description "in the excavation over the vault," and if that testimony was admissible, of which we entertain no doubt, we are un-

able to perceive upon what ground the production, identification, and introduction of the implements themselves in evidence could be objectionable.

The objection to the admission in evidence of the implements found in the appellant's trunk is based on the ground that "they were not used in the perpetration of, or in the attempt to perpetrate, the offense charged." And that "if they were burglars' tools, then they were evidence of another crime." There was evidence, however, which tended to prove that burglars' tools had been "used in the perpetration, or in the attempt to perpetrate, the offense charged," and that, coupled with the fact "that the defendant was in the vicinity at or about the time the burglary was committed," furnished a sufficient ground for the introduction of evidence to show "the possession by the defendant, at or about that time, of corresponding tools." (*People vs. Winters*, 29 Cal. 658.)

Among the articles exhibited in the presence of the jury was "a cylindrical steel bar, about half an inch in diameter and about eight inches long, which he (the witness exhibiting it) said he had made for the purpose of screwing upon it the said coupling or sockets"—one of which was found in the hole over the bank vault and the other in the trunk of the defendant. The Court, against the objection of the counsel of appellant, permitted the witness "to make experiments in the presence of the jury with the couplings or sockets attached to said cylindrical bar." The ground of the objection was that the cylindrical bar was not in evidence. It had not been formerly offered in evidence, and the counsel for the prosecution stated that they did not intend to offer it in evidence. But the witness had exhibited it on the witness-stand, and had stated that he had it made for the purpose of screwing "said coupling or sockets" upon it. The object of screwing "said coupling or sockets" upon it is not stated, nor to us apparent. Still, in support of the correctness of the ruling of the Court below, we are bound to presume, unless the contrary appears, that the object was a legitimate one. Perhaps the use to which the coupling or sockets might be put could be made more clear by screwing them upon said cylindrical bar. It was not objected that the witness was not an expert, and we are unable to determine from anything before us that it was not necessary for him to use said cylindrical bar in order to elucidate and illustrate clearly the character of the "coupling or sockets" which had been admitted in evidence. It was not only proper, but of the first importance, that the prosecution should show that the implements found on the vault and

in the appellant's trunk were "burglars' tools." And we must presume that it was for that or some other legitimate object that the witness was permitted to experiment with some of them in the presence of the jury, and that he was allowed to use an instrument of his own for the purpose of making the experiment better understood than it otherwise would be.

The objection to the question put to the witness Aitken was properly overruled.

The Court refused to give the following instruction, which the defendant requested to have given to the jury: "Before you can find the defendant guilty of the charge in the information you must be entirely satisfied from the evidence that the defendant entered the house, room, shop, warehouse, store or building of Peder Sather, in the city and county of San Francisco, with the intent then and there to commit larceny;" but gave the following: "I instruct you that it is not sufficient for you to find that the defendant entered the house, room, shop, warehouse, store or building of Peder Sather; but in addition to such entry you must find that he entered with the intent to commit larceny therein, and if you do not so find you should acquit the defendant."

We are unable to discover any satisfactory reason for the Court's refusal to give the instruction which it was requested to give. But since there is no substantial difference between that and the one which it gave, it is not a sufficient ground for reversing the judgment. And this applies as well to the refusal to give the instructions numbered 21 and 23, which the defendant also asked to have given.

But the jury did not find the defendant guilty of burglary, and did find him guilty of an attempt to commit burglary only, so that he could not have been prejudiced by the refusal to give an instruction which contained a correct definition, not of the crime of which he was found guilty, but of a higher one. Therefore the material question is, whether the jury was correctly instructed as to what facts it was necessary to prove before the defendant could be found guilty of an attempt to commit burglary. And the instruction given upon that point is attacked by appellant's counsel, who insist that "it is clearly erroneous and was fatally prejudicial." It reads as follows:

"If the jury find from the evidence, beyond a reasonable doubt, that the defendant did, at the time charged in the information, intend and attempt to enter the house, room, apartment, building, etc., described in the information of said Sather, then in his occupancy, with the intent to

commit larceny therein, *and did some act to carry out said attempt*, but was anticipated in his *said attempt*, and before the alleged entry was completed or consummated, and before said larcenous attempt was carried out, and was interrupted, prevented and anticipated in said attempt while in or about the act of carrying it out by outside agencies, and against his will and consent; and if you find that he had not alone made preparations *for said attempt*, but was directly at the time of said prevention engaged in making movements toward consummating *such an attempt*, then, and in such case only, you can find the defendant guilty of an attempt to commit burglary in the first degree, if the attempt was made between sunset and sunrise; of burglary in the second degree, if it were made between the hours of sunrise and sunset."

Of course the attempt, if any was made to commit burglary, consisted in doing some act or acts toward the commission of that crime, and if the defendant was "prevented and anticipated in said attempt," it would logically follow that he never made it. He might have made preparations for the commission of the crime without being guilty of an attempt to commit it. And if this instruction would be liable to lead the jury to confound a preparation to commit the crime with an attempt to commit it, it would be clearly erroneous. But the Court in the following extract attempted to point out the distinction between a preparation and an attempt: "And if you find that he had not alone made preparations for said attempt, but was directly, at the time of said prevention, engaged in making movements toward consummating such an attempt, then, and in such case *only*, you can find the defendant guilty of an attempt to commit burglary." It is difficult to uphold such an instruction as this, and if the evidence in regard to the acts of the defendant was of a character to render it doubtful whether he was making preparations for an attempt to commit burglary, the difficulty would be greatly enhanced, if not quite insurmountable. As it is, we do not think that the jury could have been misled by that instruction to the prejudice of the appellant, although we would be much better satisfied if the Court had given the instruction which the defendant's counsel asked to have given upon this point.

It was charged in the information that the defendant feloniously and burglariously entered "the house, room, shop, warehouse, store and building of Peder Sather, then and there doing business under the firm name and style of Sather & Co., situated on the northeast corner of Mont-

gomery and Commercial streets, in said city and county of San Francisco, and known as No. 520 Montgomery street."

The evidence tended to show that Sather owned that building and that he occupied the first floor as a banking office, and rented the second and third floors to tenants. We are unable to discover any conflict in the testimony of the witnesses upon the questions of ownership and occupancy.

One of the instructions excepted to by the defendant reads as follows:

"If you believe from the evidence, beyond a reasonable doubt, that the stairs, hall-way, privy-room and water-closet, and closet under the stairs, spoken of in the evidence, were at the time of the alleged entry in the occupancy of Peder Sather, doing business as Sather & Co., named in the information, and that the defendant entered in and upon such occupancy, as charged in the information, with intent to commit larceny in any part of the house or building of said Sather, then in his occupancy, then it is your duty to find the defendant guilty."

We are urged to sustain the exception to this instruction, on the ground that there was no internal communication between the part of the building entered and that in which it was alleged that the defendant intended to commit larceny. But in order to justify the verdict rendered in this case, it is not necessary that the evidence should show that the defendant effected an entrance into any part of the building. Proof of an attempt to enter with the intent to commit larceny is sufficient. But were it otherwise, we should find no difficulty in holding that an entrance effected through a trap-door leading from the second floor of the building, to the vault located in that part of the building occupied by Peder Sather as a banking office, would constitute "an entry in the occupancy of Peder Sather." The trap-door would constitute "some internal communication" between the closet on the second floor and the banking office on the first. We do not think that this instruction assumes that Sather was in the occupancy of any part of the building. Nor do we think that that is assumed in another instruction which is excepted to on that ground alone.

Upon the question of what was or was not sufficient evidence to sustain the allegation in the information as to the occupancy of Peder Sather, we think that the instructions are as full, explicit and accurate as the case required that they should be, and we think that there was no error in the

Court's refusing to give the instruction which it was asked to give in regard to the weight which the jury might attach to the circumstance of burglars' tools having been found in the defendant's possession at or about the time of the alleged commission of the crime with which he was charged. The instructions asked and refused on that point did not accord to the circumstance, when considered in connection with other circumstances in the case, all the weight to which it was entitled.

Judgment and order affirmed.

We concur: Ross, J., McKinstry, J., Myrick, J., Morrison, C. J., McKee, J.

IN BANK.

[Filed November 28, 1882.]

No. 6974.

UPHAM, RESPONDENT, VS. HOSKING, APPELLANT.

TIDE LANDS—PATENT—CURATIVE ACT OF 1872. Plaintiff claims title to a portion of the land sued for in this ejectment action under a State patent issued May 18, 1872. The premises embraced in the patent are below high-water mark, and include a wharf which extends into the water, of such depth that vessels can be moored at it for receiving and discharging cargo. *Held*, such tide lands were not subject to sale under the Act of 1868. *But further:* The Curative Act of March 27, 1872, validated sales so made. The State was the owner of the land (C. C. 670), and the title of the State vested in plaintiff by virtue of such Act of March 27, 1872. (Stats. 1871-2, p. 587.)

ID.—ID—CERTIFICATE OF PURCHASE—PRESUMPTION—OFFICIAL DUTY. To the objection that it did not appear that plaintiff had a certificate of purchase when the Act of 1872 went into operation, and therefore not entitled to the benefit of its provisions, *held*, plaintiff is entitled to the presumption that the officer issuing the patent regularly performed his duty in issuing it to him, and that he would not have issued it had not plaintiff brought himself within the provisions of the Curative Act.

ID.—TOWN. The evidence shows that the place called Collinsville was not a town.

ID.—RESERVATION—DEED—EVIDENCE—WHARF—BUILDING. On the premises was a wharf and part of a building. *Held*, the building did not constitute a part of the wharf, and was not therefore reserved from the operation of a deed containing a reservation of "the wharf and wharf franchises."

ID.—GRANT—FORFEITURE—FRANCHISE. As to the remaining portion of the premises, there had not been a compliance with the terms of a grant by the Legislature, and all rights thereunder had been forfeited to the State before the accrual of the title claimed by plaintiff. (Stats. 1861, p. 300.) No action was necessary to enforce the forfeiture. It needed not to be established judicially. The forfeiture was declared by the statute; and when so declared, the title to the thing forfeited immediately vests in the State, upon the happening of the event or the commission of the offense for which the forfeiture is declared.

Appeal from Seventh District Court, Solano County.

Lamont and Brooks, for appellant.

J. F. Wendell, for respondent.

THORNTON, J., delivered the opinion of the Court:

Action to recover possession of certain lands described in the complaint, situate in the county of Solano. The plaintiff had judgment. Defendant moved for a new trial, which was denied, and he prosecutes this appeal from the judgment and order just mentioned.

As to a portion of the land sued for (part of Swamp Land Survey No. 17), on which was a portion of a building, it is admitted that the title was in one Brown, and that the conveyance from him to plaintiff passed to the latter (Brown's) title to that portion of the lot which was covered by the building, unless excluded from the operation of the conveyance by a reservation contained in it of "the wharf and wharf franchises." On the premises in controversy was a wharf and part of the building above mentioned.

It is contended here that this building constituted a portion of the wharf, and was embraced in the reservation aforesaid, and therefore did not pass to the plaintiff under Brown's conveyance.

On an examination of the evidence, we are of opinion that this contention is untenable, that the building did not constitute a part of the wharf, and was not therefore reserved from the operation of the deed.

As to the remaining portion of the premises sued for, the defendant claimed under a grant on certain conditions made to one Collins, in which grant it was provided that on failure to comply with the conditions, all the rights granted by the Act should become forfeited to the State. The Court below found and held that there had not been a compliance with the terms of the grant, and that all rights under the Act had been forfeited to the State before the accrual of the title claimed by plaintiff. This matter will be better understood from the findings of the Court in regard thereto. They are as follows:

"As to the affirmative matter alleged in defendant's answer, the Court finds:

"That a private statute of the State of California was enacted by the Legislature thereof, entitled and approved as alleged in said answer, the whole of which statute is contained in the printed statutes of California for the year 1861, on page 300 thereof. That by the terms thereof there was

granted to one C. J. Collins, his associates and assigns, for the term of twenty years, from the date of May 6, 1861, the right to establish a ferry across the upper end of Suisun Bay, from the point known on Ringold's map of Suisun Bay as 'Point Collberg' in Solano County, to a place known as New York, in Contra Costa County, and said parties were also authorized to construct a wharf at each of the landing-places of said ferry, one in Solano County and one in Contra Costa County, which wharves were required by said Act to be substantially built, of such materials and of such dimensions as to make said wharves sufficient for all the purposes of a steam ferry as well as for the local business of the two points; and from time to time said wharves were required to be enlarged as the commerce of the places might require.

"That by the terms of the said Act there was granted to the said C. J. Collins, his associates and assigns, for the purposes of the ferry and wharves aforesaid, the use and occupation of a strip of land at each of the said wharves, commencing at high tide six hundred (600) feet wide along the water-line in Solano County and three hundred (300) feet wide along the water-line in Contra Costa County, and commencing at high-water mark and running into the bay to a point where the water is ten feet deep at low tide.

"That all of said grants, rights, and privileges, however, were made upon the terms and conditions expressed in Section 4 of said Act, which is as follows:

"Section 4. The said parties herein named shall within six months from the passage of this Act commence the building of the wharves herein provided for, and within nine months shall have the steam ferry in operation, with a steam ferry-boat running between said wharves of sufficient capacity to accommodate the public travel; *provided*, that if the said parties shall fail to commence and complete the said wharves and establish the said ferry within the time prescribed in this Act, or in any other manner violate its provisions, then all the rights granted by this Act shall become forfeited to the State.

"That neither the said C. J. Collins, his associates or assigns, being the parties in said Act named, ever complied with in any of the requirements of said Section 4 of said Act, except that the wharf described in plaintiff's complaint was commenced by said Collins within six months from the passage of said Act and thereafter completed by him.

"That neither said Collins, his associates or assigns, ever established or put in operation any ferry of any kind between the points named in said Act, or between either of said

points and any other point, and never commenced building, or completed, or owned any wharf whatever in said Contra Costa, but totally failed to comply with each and every requirement of said Act, except as to building the wharf in Solano County, as aforesaid. That eighteen years have elapsed since the passage of said Act.

"That by reason of such non-compliance, all the rights and privileges granted by said Act to said Collins, his associates and assigns, became forfeited to the State of California.

"That said land at all the times mentioned in said answer was subject to sale, and had never been at any time reserved by the State of California from sale."

In regard to this last proposition the Court decided correctly both in point of law and fact. No action was necessary to enforce the forfeiture. It needed not to be established judicially. The forfeiture was declared by statute, and when so declared, the title to the thing forfeited immediately vests in the State, upon the happening of the event or the commission of the offense for which the forfeiture is declared. This is settled law in this State; so held under like circumstances in *Borland vs. Lewis*, 43 Cal. 572, and *O. R. R. Co. vs. F. V. R. R. Co.*, 45 *id.* 377.

The plaintiff claims title to the said last-mentioned portion of land under a patent from the State of California, bearing date the 18th day of May, 1872. The premises embraced in the patent are below high-water mark, and include the wharf, which extends into the water of such a depth that vessels can be moored at it for receiving and discharging cargo.

On an examination of the cases of *Taylor vs. Underhill*, 40 Cal. 471, *Kimball vs. McPherson*, 46 *id.* 103, and *People vs. Cowell*, (opinion filed April 6, 1882), we are of opinion that such tide lands were not subject to sale under the Act of 1868. Such, we think, is the proper interpretation of the judgment of this Court in *Kimball vs. McPherson*, which case arose under the Act of 1868—the same Act under which the plaintiff made his application. At the close of the opinion in this case the Court used this language: "Nothing short of a very explicit provision to that effect would justify us in holding that the Legislature intended to permit the shore of the ocean between high and low-water mark to be converted to private ownership." *People vs. Cowell* is in the same line of decision. (See, also, *People vs. Morrell*, 26 Cal. 336.)

Taylor vs. Underhill was also an application under the Act of 1868, and, although the point in judgment was that tide land belonging to the State by virtue of its sovereignty

could not be purchased under an application for swamp and overflowed land, the remarks of the Court as regards the Act of 1868 accord with the conclusions reached in *Kimball vs. McPherson*.

Although the land sought to be purchased was on the shore of the ocean, still the same reasoning applies to the land between high and low-water mark everywhere. We do not think that the Court intended to hold that such portions of the tide lands between high and low-water mark, which could be used for commercial purposes, as could be reclaimed for agricultural purposes, were subject to sale, and those which could not be reclaimed were not subject to sale, but that in their judgment the tide lands subject to sale and purchase were those described in *People vs. Morrell*, 26 Cal. 355, as the channels of greater or less width within the ebb and flow of the tide, threading the swamp lands, which channels are of little or no use either in the way of fishing or navigation. Note the observations of the Court on this point in 26 Cal. 356.

But it is said that this defect is cured by the fourth Section of the Act of 27th of March, 1872. It was said in *Rowell vs. Perkins*, 56 Cal. 226, of this Act: "The Act of March 27, 1872, is very broad and comprehensive. It validates every application to purchase land from the State when payment has been made, in whole or in part, to the treasurer of the proper county. When the Act of 1872 was passed, the State owned the land, and by that Act disposed of it. It had received a portion of its value, and had full power to conform or perfect conditionally or otherwise any attempted purchase, even if when the application was made there was an entire failure on the part of the applicant to comply with the existing laws, or if the State did not then own the land or had adopted no legislation for the disposition of it." This ruling was approved and followed in *Muller vs. Carey*, 58 Cal. 538.

That the State is the owner of the land embraced in the patent is declared by Section 670 of the Civil Code, and in accordance with the rule laid down in the cases just cited, we hold that the title of the State vested in the plaintiff by virtue of the Act of March 27, 1872.

It is urged that the Act of 1872 is retrospective (it was so held in *Johnson vs. Squires*, 55 Cal. 103), and that inasmuch as it does not appear that the plaintiff had a certificate of purchase when the Act of 1872 went into operation, he is not entitled to the benefit of its provisions. But we think that the plaintiff is entitled to the presumption that the

officer issuing the patent regularly performed his duty in issuing it to him, and that he would not have issued it had not plaintiff brought himself within the provisions of the Curative Act of 1872.

An objection is made to the title of plaintiff that the land patented to him was within two miles of the town of Collinsville. But the Court in its finding is sustained by the evidence. The evidence shows to us that the place called Collinsville was not a town.

Judgment and order affirmed.

We concur: Morrison, C. J., McKee, J., Sharpstein, J.

We concur in the judgment: McKinstry, J., Myrick, J.

IN BANK.

[Filed November 23, 1882.]

No. 7331.

WILSON, RESPONDENT,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,

APPELLANT.

NEGLECT—NONSUIT. Action for negligence. *Held*, the Court properly refused a nonsuit, and the evidence warranted the verdict.

ID.—WAREHOUSE—FIRE—BAILMENT. The liability of warehousemen for loss of goods by fire discussed.

Appeal from Superior Court, San Benito County.

McKisick, Briggs & Hawkins, for appellant.

Laine & Lieb, for respondent.

McKEE, J., delivered the opinion of the Court:

The appeal in this case comes from a judgment and order denying the motion of appellant for a new trial in an action to recover damages for the destruction of certain property of the respondent, by a fire caused, as alleged, by the negligence of the appellant and its employees in conducting and managing its warehouse in which the property had been stored.

The case was tried by the Court with a jury, and a verdict was rendered against the appellant. If there was any evidence to warrant the verdict we cannot review it on appeal. It is conclusive upon us, not only on the question of negligence, but upon all the allegations in the complaint material to recovery in the action. (*Algier vs. Steamer Maria*, 14

Cal. 172; *Brown vs. Brown*, 41 *id.* 88; *Trenor vs. C. P. R. R. Co.*, 50 *id.* 232.) It is, however, contended that there was no evidence to sustain the verdict, and that the Court below erred in denying a motion for a nonsuit.

It was proved on the trial that the respondent had stored in the appellant's warehouse sixty-four bales of wool of a certain value per pound, which, on demand and tender of the storage due upon it, the appellant refused to deliver to the respondent, assigning as a reason that the warehouse and all it contained, except about three bales, which were returned to him, had been consumed by fire.

A *prima facie* case of negligence is made out against a warehouseman, who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone the burden is on him to account for the property; otherwise he shall be deemed to have converted it to his own use. But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. (*Harris vs. Packwood*, 3 Taunt. 264; *Beardslee vs. Richardson*, 11 Wend. 26; *Brown vs. Johnson*, 29 Tex. 43; *Lamb vs. Camden and Amboy R. R. Co.*, 46 N. Y. 271; *Jackson vs. Sac. Val. R. R. Co.*, 23 Cal. 269.)

The negligence of the appellant, as the proximate cause of the loss of the property by fire, thus became the essential fact to recovery; and the burden of proof was upon the plaintiff in the action. It was incumbent on him to prove that the defendant had, by some act of omission, violated some duty by reason of which the fire originated; or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit, the fire by which the property was destroyed.

Direct and positive evidence of negligence as a fact is not required. Any circumstances which tend to prove it, or from which it may be reasonably inferred, are sufficient. And when such evidence has been given on the trial of an action, it is not for the Court to usurp the disposition of the fact by ordering a nonsuit. Such an order should not be made, unless there is no evidence at all, or a mere scintilla of evidence wholly insufficient for the consideration of the jury, or unless the facts are agreed upon, or admitted, and, in the judgment of the Court, are insufficient to constitute a cause of action. Upon facts admitted, or proved and found, it is the duty of the Court to say what the law applicable to them is. But where negligence, as the essential

fact in the case, is disputed, and the evidence of it is conflicting, or consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine, under instructions by the Court, whether the evidence establishes it as the proximate cause of the injury complained of.

Applying these principles to the record before us, we find there was no error in sending the case to the jury. For the evidence upon which the plaintiff rested went to show that the building, up to the time of the fire, had been used by the defendant as a warehouse and railroad depot, and was in charge of two employees of the defendant, one of whom was its local agent and the other its warehouse keeper. In the warehouse, cut off from the northern end of the building, there was, adjoining the office and sitting-room of the railroad depot, a bedroom in which the keeper slept every night. The room was about fourteen feet square; its walls were constructed of upright redwood boards, about fourteen feet high, which were lined with cloth and paper. It was occupied with the bed and furniture of the keeper, and on the walls hung his clothes and files of newspapers. On a shelf against one of the partition walls in the warehouse were kept several lamps trimmed and ready for use. On the evening of the fire the local agent had left the warehouse in charge of the keeper, whose duty it was to "shut up the doors of the warehouse and fasten it up for the night." Having performed that duty, the keeper himself went to supper, and after supper returned to the warehouse. When he returned he went into the office, lit one of the lamps, took it into his bedroom, and sat it down on a little stand at the head of his bed, between the window and bed, and about three feet from the window. He remained while he changed his clothes and dressed himself for the purpose of going out to visit some friends. Having finished his toilet, he locked up and left the warehouse.

What he did with the lighted lamp before leaving is thus stated by himself: "After I had partially changed my clothing I returned to the office and remained there perhaps half an hour, or perhaps three-quarters of an hour. * * * I think I extinguished my lamp and went away. * * * No lamp was burning when I left the depot. When I came out of the office into the sitting-room I turned down the lamp, blew it out, and sat it on little shelf within the office, to the left of the office door * * * I looked at it, saw it was out, and left it." About an hour or so after he had gone the warehouse was afire.

The first person to observe the fire was the proprietor of a hotel, situate about 300 feet from the warehouse. Seated in the front office of the hotel, looking through the glass window of the door of the office, his attention was arrested by a sudden flash of light, which momentarily lighted up the warehouse and then went out, leaving the warehouse enveloped in smoke. Remarking to some one near him that the warehouse was afire, he ran out and gave the alarm. Those whom the fire alarm drew first to the burning building, discovered, as they ran to it, the fire dropping from about the center of the warehouse, very near to the locality of the bedroom and office; and on reaching the spot, they kicked in the bedroom and office windows, and saw the office filled with smoke and the bedroom afire—the flames running up the partition walls and over the bed.

There is no doubt that the warehouse keeper had the right to light the lamp and use it in the bedroom and office before leaving the warehouse; and it was reasonable to infer that a careful use of the lamp would not have set fire to the warehouse. But it would also be a reasonable inference that a negligent use of the lamp might have occasioned the fire; and the question arose whether, under all the circumstances in connection with the use of the lamp, the warehouse keeper *was* careless in using the lamp while in the bedroom and office, or in the extinguishment of it before he left the warehouse. If he was careless in its use or extinguishment, and that carelessness caused the lamp to explode or otherwise ignite any inflammable matter near to it which fired the building, the fire would be attributable to the negligence of the defendant.

Now, it was an indisputable fact that the warehouse was fired from some cause; it was also indisputable that the fire occurred while the warehouse, in which the keeper had been using a lighted lamp, was under the lock and key of the defendant, and soon after the warehouse had been closed by the keeper for the night; and (as the evidence tended to show) the fire originated at or "very near" the bedroom and office in the warehouse in which the lamp had been used. It is manifest that these facts and circumstances point, somewhat at least, in the direction of the lamp as the cause of the fire. And even if inferences to be drawn from them as to the origin of the fire were uncertain and controvertible, yet as differences of opinion upon the subject might reasonably exist in the minds of intelligent men, the facts and circumstances were for the consideration of the jury and not for the Court. It was for the jury to determine from them, in

connection with the other circumstances in the case, whether the warehouse keeper used due care in respect to the lamp, its use and extinguishment; and whether the fire originated in his carelessness or from accidental causes—such as spontaneous combustion of the wool in the warehouse. Defendant's counsel attributed the fire to that cause. But there seems to be nothing in the evidence in the record to sustain his theory. And, however that may be, there was in the evidence of the case sufficient to warrant the Court in submitting it to the consideration of the jury.

There was, therefore, no error in denying the motion for a nonsuit, nor did the Court err in overruling objections which were made at the trial to the admission of evidence which tended to show the condition of the building at the time of the fire, and all the facts and circumstances connected with the fire. These were properly allowed to go to the jury for their consideration upon the issue submitted to them.

The Court may have erred in denying the defendant's motion to strike out the averment in the complaint, that "the defendant was the owner of and operated a railroad in the county," etc., but it was error without injury; for the fact that the defendant was in possession of the building, and used it as a warehouse and depot in connection with its railroad, was proved in the case without objection; and it was inseparably connected with the evidence as to the use of the warehouse. We cannot, therefore, perceive how the averment of the fact in the complaint tended to "irritate and excite the prejudices of the jury against the defendant." There is nothing in the record suggestive even of the existence of such prejudices; and nothing to overcome the presumption that the verdict was a fair expression of judicial opinion warranted by the evidence, submitted to the jury for their consideration.

Some parts of the charge of the Court may be subject to verbal criticisms, but we see nothing in it inharmonious or misleading. Taken as a whole, it fairly submitted the case to the jury; and under such circumstances the verdict will not be disturbed for mere inaccuracies or errors from which no possible injury could have resulted to the defendant.

The newly-discovered evidence upon which the defendant asked for a new trial was cumulative. We cannot say that the damages given by the jury are excessive, or appear to have been given under the influence of passion or prejudice.

No error prejudicial to the defendant appearing in the record, the judgment and order appealed from are affirmed.

We concur: Ross, J., Sharpstein, J., Myrick, J.

I concur in the judgment: McKinstry, J.

IN BANK.

[Filed December 11, 1882.]

No. 8308.

MCCARTHY, APPELLANT, vs. LOUPE, RESPONDENT.

REAL ESTATE BROKER—SALE—COMMISSIONS—CONTRACT. No recovery can be had by a broker for services in selling real estate unless his employment is evidenced by an instrument in writing. (C. C. 1624.) A recovery cannot be had upon an implied promise.

ID.—NEW TRIAL—APPEAL. This is not the ground upon which the Court granted the motion for a new trial, but it is a ground upon which the respondent was entitled to have a new trial.

Appeal from Superior Court, San Francisco.

William M. Pierson, for appellant.

Stanley, Stoney & Hayes, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The Code provides that "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent, (C. C. 1624.) It is not claimed that the agreement in this case, or any note or memorandum thereof, was in writing. But it is claimed that the plaintiff may, nevertheless, recover what his services were reasonably worth, upon a promise implied by law by reason of the loss which he has sustained in rendering the service, and the benefit received by the defendant in accepting the same.

That there are cases in which the law will imply a promise to pay for services rendered by one person for another in the absence of any actual promise to pay therefor, cannot be doubted. But no case has been brought to our attention in which it has been held where proof of employment is indispensable to a right to recover for services, that in the absence of such proof a recovery can be had. And to entitle a broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by

the owner (or on his behalf) to make the sale. (*Pierce vs. Thomas*, 4 E. D. Smith 354; *Hinds vs. Henry*, 36 N. J. 328; *Edward on Factors* 144.)

But for the provision of the Code above cited, it may be that the absence of an express contract might be supplied by proof of usage regulating transactions of this kind. (*Wilkinson vs. Martin*, 8 C. and P. 1; *Burnett vs. Bouch*, 9 C. and P., 920; *Read vs. Raun*, 10 B. and C. 438; *Winsor vs. Dillomay*, 4 Met. 221; *Cook vs. Welsh*, 9 Allen 650.) But it was held in *Hinds vs. Henry*, *supra*, that a plaintiff in such a case could not recover under the common counts.

It would seem, therefore, that no recovery could have been had before the Code, without proof of an express contract or of a usage regulating such transactions. The law in such a case would never imply a contract. Since the Code, no express contract in a case like this can be of any avail unless in writing. This particular kind of contract can only be proved by the introduction of an instrument in writing. Therefore the plaintiff failed to prove an express contract, and it was upon an express contract alone that he was entitled to recover.

This is not the ground upon which the Court granted the motion for a new trial, but it is a ground upon which the respondent was entitled to have a new trial. Therefore we cannot disturb the order granting it.

Order affirmed.

We concur: Morrison, C. J., McKinstry, J., Myrick, J., Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed November 23, 1882.]

No. 8593.

VANDEFORD, RESPONDENT, vs. FOSTER, APPELLANT.

CASE FOLLOWED—CLAIM AND DELIVERY—VERDICT—NEW TRIAL. *Garlick vs. Bower*, November 15, 1882, followed.

Appeal from Superior Court, Tehama County.

Chipman & Garter, for appellant.

Banks & Barry, for respondent.

By the COURT:

On the authority of *Garlick vs. Bower*, No. 8378, filed November 15, 1882, order denying appellant's motion for a new trial reversed and cause remanded.

DEPARTMENT No. 1.

[Filed December 2, 1882.]

No. 7495.

HENDY, RESPONDENT,

vs.

DESMOND (SWEENEY), APPELLANT.

PROMISSORY NOTE—INDORSER—PROTEST. Action against the maker and indorser of a promissory note. The maker suffered default, but the indorser answered. *Held*, on appeal, the facts stated in the notary's protest did not show that the notice required by the law was given. (C. C. §144.)

ID.—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE—DIRECTORY. After judgment for the indorser plaintiff moved for a new trial, basing his motion on an affidavit of the notary, in which he stated that, after his examination as a witness in the case, he examined the city directory, thinking that, if he could ascertain the business of Sweeney (indorser), he might be able to recall the manner of the service of the notice of protest; that in the directory he found Sweeney described as keeping certain marble works, and that that fact brought the manner of his service of the notice of protest distinctly back to his mind; and the affiant then proceeded to detail the manner of service of the notice, which showed a compliance with the statutory requirements. On the strength of this affidavit the Court below granted a new trial. *Held*, the affiant disclosed a mere want of recollection. The city directory was open to the witness as well before as after the trial, and an examination of it before the trial would have disclosed the business of Sweeney as well as an examination of it afterward. Due attention, in due season, would have afforded the witness the data which he deposed refreshed his memory; and that being so, its subsequent discovery was not sufficient ground for a new trial.

Appeal from Superior Court, San Francisco.

J. R. Brandon, for appellant.

King & Rodgers, for respondent.

Ross, J., delivered the opinion of the Court:

We must reverse the order of the Court below granting a new trial. The action is against Desmond, as maker, and Sweeney, as indorser, of a promissory note for \$565 and interest. Desmond suffered default, but Sweeney answered in the cause, denying that the note was presented to the maker at maturity for payment, and denying that notice was given to him (Sweeney) of the non-payment by Desmond.

On the trial of the case the plaintiff introduced in evidence the protest of the notary, which recites: "I do hereby certify that on the 2d day of November, A. D. 1875, notice in writing of protest, demand, and non-payment of the above-

mentioned note was served upon John Sweeney, the indorser of said note, in the city of San Francisco, by letter addressed to him, and personally delivering the same at his reputed place of business, No. 775 Market street, in this city, he being absent from his place of business, by direction of said holders." The notary was twice examined as a witness on the trial, and testified that he could not recollect anything more about the service of the notice than was stated in the certificate of protest.

By Statute—Political Code, Sec. 795—the protest of a notary is made *prima facie* evidence of the facts therein stated. But the facts stated in the protest in this case did not show that the notice required by the law was given. Section 3144 of the Civil Code provides that a notice of dishonor may be given."

"1. By delivering it to the party to be charged, personally, at any place; or,

"2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or,

"3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the Post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon."

As the notice of the dishonor of the note required by the law was not given to the defendant Sweeney, the trial Court properly gave him judgment. But after this the plaintiff moved for a new trial, basing his motion on an affidavit of the notary, in which he states that after his examination as a witness in the case, he examined the city directory, thinking that if he could ascertain the business of Sweeney he might be able to recall the manner of the service of the notice of protest; that in the directory he found Sweeney described as keeping certain marble works, and that that fact brought the manner of his service of the notice of protest distinctly back to his mind; and the affiant then proceeds to detail the manner of service of the notice, which shows a compliance with the statutory requirements. On the strength of this affidavit the Court below granted a new trial. But the affidavit discloses a mere want of recollection. The city directory was open to the witness as well before as after the trial, and an examination of it before the trial would have disclosed the business of Sweeney as well as an examination of it afterward. Due attention, in due season, would have

afforded the witness the data which he deposes refreshed his memory; and that being so, its subsequent discovery is not sufficient ground for a new trial.

While we do not, of course, impute to the witness in this case anything of the sort, it is manifest that the sanction of such a practice would open the door to the unscrupulous for the perpetration of perjury, and would be fraught with great danger. (See *Arnold vs. Skaggs*, 95 Cal. 684; *Graham and Waterman on New Trials*, Vol. 1, pp. 477-9; *Id.*, Vol. 9, pp. 1081, 1095-6; *Bond vs. Cutter*, 7 Mass. 205; *Harbour vs. Rayburn*, 7 Yerg. 432.)

Order reversed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed December 20, 1882.]

No. 8640.

CAPITAL SAVINGS BANK, APPELLANT,

vs.

REEL ET AL. (CAVE), RESPONDENTS.

ACCOMMODATION MAKER—NOTE. Action upon a note given by the firm of Reel & McGraw, with defendant Cave as accommodation maker. *Held*, on appeal: There was evidence tending to show that the note was paid by Reel & McGraw, and surrendered to them—a though subsequently retaken by plaintiff from them, and held by it, without the knowledge or consent of defendant Cave. If the jury believed such evidence, notwithstanding the evidence in conflict, the verdict in favor of Cave was correct. In such case it will not be disturbed.

Id.—Id. There was also evidence tending to show that plaintiff had sufficient property of Reel & McGraw attached to secure the payment of the note, and that the attachment was released without the knowledge or consent of Cave. He being an accommodation maker, should not, under such circumstances, be injured by the acts of plaintiff.

Appeal from Superior Court, Sacramento County.

George E. Bates, for appellant.

Taylor and Catlin, for respondents.

By the COURT:

There was evidence tending to show that the note in suit was paid by Reel & McGraw and surrendered to them, although subsequently retaken by the plaintiff from Reel & McGraw and held by it without the knowledge or consent of

the defendant Cave. If the jury believed such evidence, notwithstanding the evidence in conflict, the verdict was correct. In such case we will not disturb the verdict.

There was evidence, also, tending to show that the plaintiff had sufficient property of Reel & McGraw attached to secure the payment of the note, and that the attachment was released without the knowledge or consent of the defendant Cave.

Cave being an accommodation maker, should not, under such circumstances, be injured by the acts of plaintiff.

No error appearing, the order is affirmed.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 7547.

PRESTON ET AL., RESPONDENTS,

VS.

HOOD ET AL., APPELLANTS.

UNDERTAKING—ATTACHMENT—ACTION — EVIDENCE—COMPLAINT — CONSIDERATION. In an action on an undertaking given to prevent the levy of a writ of attachment, plaintiff must allege and prove the consideration for which the undertaking was executed.

ID.—ID. The undertaking sued on was not given for the release of any property; it was given under Section 556 C. C. P., to prevent the levy of the writ. Other sections, to wit, 554 and 555 of the same Code, relate to the giving of an undertaking for the purpose of procuring the release of property already levied on.

Appeal from Superior Court, San Francisco.

Splivalo, Moore & Moore, for appellants.

Van Dyke & Power, for respondents.

Ross, J., delivered the opinion of the Court:

This is an action on an undertaking given to prevent the levy of a writ of attachment. In such cases it is well settled that the plaintiff must allege and prove the consideration for which the undertaking was executed. (Coburn vs. Pearson, 57 Cal. 306 and cases there cited.) While the complaint in the present case counts on the execution of an undertaking to prevent the levy of the writ, there is neither averment,

finding, nor proof that the writ was not levied because of the undertaking, but, on the contrary, averment, finding, and proof, to the effect that upon the execution and delivery of the undertaking, the Sheriff *released* property which had been previously levied on. But the undertaking sued on was not given for the release of any property. Perhaps the defendants would not have executed an undertaking for that purpose. Whether they would or not, they did not. Their undertaking was given under Section 556 of the Code of Procedure to *prevent* the levy of the writ. Other sections, to wit: 554 and 555 of the same Code, relate to the giving of an undertaking for the purpose of procuring the release of property already levied on.

Judgment and order reversed, and cause remanded.

We concur: McKinstry, J., McKee, J.

Abstracts of Recent Decisions.

BILL OF EXCHANGE—"AGENT"—PERSONAL LIABILITY. The character of the liability of the drawer of a bill of exchange must be determined from the instrument itself; and the addition of the word "agent" to his name, without anything else on the instrument indicating his principal, does not relieve him from personal liability as drawer of the bill.—*National Bank vs. Cook et al.*, Nov. 7, 1882, Sup. Ct. Ohio, 3 Ohio L. J. 314.

NEGOTIABLE INSTRUMENT—AMOUNT IN BODY LEFT BLANK. The body of a promissory note read thus: "Fifteen months after date I promise to pay to the order of Richard Thomas — dollars." The margin of the note contained this, "\$200." *Held*, that the figures were not sufficient to authorize the reformation of the instrument so as to read as a note for two hundred dollars. The figures in the margin of the note are no part of the instrument; they constitute a mere memorandum. They cannot supply the blank left for insertion of the amount the maker agreed to pay. *Norwich Bank vs. Hyde*, 13 Conn. 279; *Smith vs. Smith*, 1 R. I. 398. It follows that there can be no recovery upon the note, for it is not a promise to pay any sum.—*Hollen vs. Davis*, Iowa Sup. Ct. 26 Alb. L. J. 499.

Says the Supreme Court of Indiana in *Dieh vs. Woodruff Sleeping Car Company*: "A sleeping car company is not liable as inn-keeper or common carrier, but it impliedly agrees to keep watch over its patrons while asleep, and to take reasonable care to prevent the theft of his goods and money from his person."

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Current Topics.

MALICIOUS PROSECUTION.

In *Branham vs. Berry*, 4 Ky. Law Reporter 412, the Court of Appeals of Kentucky discuss this question very clearly, and draw a very nice distinction between the effect of an acquittal by an examining magistrate and by a trial jury upon the question of probable cause. We give a portion of the opinion :

“ The law is well settled that to support an action for malicious prosecution it must appear, affirmatively, that the defendant was instigated by malice, and that he had no probable cause for the prosecution. Both must concur.

“ Malice is a condition of the mind which may be shown by direct proof of its existence, like any other fact in the case, or it may be legally inferred from other facts proven. It may be inferred from the want of probable cause, but no inference of the existence of the latter fact can be drawn from the proof of malice, and it must, therefore, be proved affirmatively. Malice and want of probable cause are not interchangeable terms, but separate and distinct ingredients necessary to support the action, and there must be affirmative proof, tending to show the want of probable cause, before the defendant can be called on for defense. *Yocum vs. Polly*, 1 B. M. 359; *Garrard vs. Willett*, 4 J. J. M. 628; *Willman, etc., vs. Abrams*, 9 Bush 738. Where the accused has been tried, acquitted and discharged by the examining magistrate, does this fact, in an action for malicious prosecution, furnish *prima facie* evidence of the want of probable cause for the prosecution? In our examination we have been unable to find any adjudication on this point in the Kentucky cases. * *

"In the decisions of other States we find it expressly decided that in an action for malicious prosecution the discharge and acquittal by the examining magistrate is *prima facie* evidence of the want of probable cause, and throws upon the prosecutor the burden of proving that there was probable cause. *Johnson vs. Martin*, 3 Murphy, N. C. Reports 248. In this case it is said that the discharge by the magistrates, after a full and fair examination of the evidence, is a presumption in favor of the plaintiff's innocence. Hence the necessity of always 'stating in the declaration that the plaintiff had been discharged from the prosecution; and when that is proved, as it always must be, it certainly amounts to *prima facie* evidence of the want of probable cause, as it is not necessary to prove express malice in this action, to the support of which implied malice is sufficient; the discharge of the plaintiff resulting from the absence of any proof of his guilt was one circumstance from which that implication might arise.'

"In *Secor vs. Babcock*, 2 Johns, N. Y., p. 203, it is decided, in substance, that an acquittal and discharge by the examining magistrate, in an action for malicious prosecution, is *prima facie* evidence of want of probable cause for the prosecution.

"In *Sharpe vs. Johnston*, 59 Mo., p. 558, it is held that the discharge of the plaintiff by the committing magistrate was *prima facie* evidence of want of probable cause. In *Strauss vs. Young*, 36 Maryland, the same doctrine is laid down. See also *Chapman vs. Dodd*, 10 Minn. 364-65, *Williams vs. Norwood*, 2 Yerger (Ten.) 329-336. But putting aside the authorities quoted, we think that the distinctions pointed out have foundation in reason.

"Where a *nolle prosequi* is entered and there is no investigation of the charges, we can well see why additional testimony, growing out of the circumstances of the prosecution, is necessary to show the prosecution was groundless.

"So an acquittal by the traverse jury is no evidence of want of probable cause, because the acquittal does not proceed upon want of probable cause, but the want of full proof of guilt. The petit jury determine the question, Is there proof of guilt? The question before the examining magistrate, Is there probable cause or ground for the prosecution? is one of the very questions involved in an action for malicious prosecution. 'Probable cause means less than *prima facie* evidence of guilt, namely, such circumstances as warrant suspicion.' *Locke vs. U. S.*, 7

Cranch 339. If there be circumstances warranting suspicion, the magistrate must commit or hold to bail; if not, he must discharge. By discharging he has determined there was no ground for suspicion—no probable cause; and therefore such discharge is evidence of want of probable cause. It is a judicial determination of the very question. Suppose a magistrate should commit a person accused of a felony or send the case to be investigated by the grand jury? Clearly, in an action against the accuser for malicious prosecution, the latter might adduce this as *prima facie* evidence of the existence of probable cause, and if the plaintiff offered no evidence this would be sufficient evidence, even in a case where the plaintiff had been acquitted on his trial in Court. The plaintiff could introduce other evidence to disprove the probable cause, which the magistrate's proceedings proved; but then unanswered, or answered only by the subsequent acquittal of the plaintiff on his trial, would show that the defendant had probable cause for the prosecution, from the legal presumption that magistrates and Courts are indifferent, and without malice to the accused. (4 Munford 465.)

“And it is a bad rule that will not work both ways. If *prima facie* evidence in the one case, it should also be so held in the other, and our conclusion, both from the weight of authority and from principle, is that when, as in this case, *the accused has, upon a full and fair investigation of the charge, been acquitted and discharged by the examining magistrate, it is prima facie evidence of the want of probable cause, in an action for malicious prosecution. It is, of course, not conclusive.* The defendant is not precluded from proving that he had probable grounds of prosecution; nor, as it seems, does the law lay on him the burden of proving legal grounds for the prosecution; it is enough to excuse him; if it appear from the circumstances of the case that he really believed the party to be guilty and was moved by an honest anxiety to bring him to justice.”

THE sum paid as fees to special counsel employed by the Department of Justice in the prosecution of the Star route and Guiteau cases makes a total of \$71,810 38. Judge John K. Porter and W. K. Davidge were paid for their services in the Guiteau trial \$10,000 each. Edward Pierrepont was paid \$3,099 25 in the past year for services in the Tilden suit.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed December 21, 1882.]

No. 8639.

CARNEY ET AL., RESPONDENTS,

VS.

THE ARIZONA GOLD MINING CO., APPELLANT.

MINING LAW—PLACER CLAIMS—WORK. The laws of Congress requiring a certain amount of annual work to be done by persons claiming to hold until patent issued apply as well to the class of claims known as *placer* claims as to the class known as lode or vein claims. (2319 to 2329, Revised Statutes U. S.)

Appeal from Superior Court, Sierra County.

P. Van Clief, for appellant.

Davidson and Cross, for respondents.

MYRICK, J., delivered the opinion of the Court:

In December, 1876, plaintiffs and their grantors located a series of placer mining claims, which claims contained about 100 acres. Work was done on said claims until October, 1878; since which day, the Court finds, "plaintiffs did no work or made any improvements on their claims, of any value whatever, for the purpose of working, prospecting or improving their claims." The Court also finds that during the absence of plaintiffs and their grantors, defendant's predecessors in interest, August 7, 1880, entered upon a portion of said lands, and located by Government subdivisions 81 72-100 acres of the mining ground previously located by plaintiffs' predecessors in interest, in compliance with the laws of Congress, and proceeded to work by tunnel and shaft within their location lines, but outside of the boundaries of plaintiffs' claims, and had, at the time of commencing this suit, expended \$6,000 in such work.

The substantial question involved in this controversy is whether the laws of Congress requiring a certain amount of annual work to be done by persons claiming to hold until patent issued apply as well to the class of claims known as *placer* claims as to the class known as lode or vein claims. The Act of Congress of May 10, 1872, (Sec. 2324, U. S. Rev. Stat.,) requires that "on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year;" and upon

a failure to perform such work, the claim shall be open to relocation in the same manner as if no location had ever been made, provided that the original locators or their representatives have not resumed work before such relocation. Granting that from a close reading of the various sections of the Act, from Section 2319 to 2328, Revised Statutes, it might appear that the clauses of Section 2324, above referred to, were intended to apply only to claims upon lodes or veins, we are of opinion that Section 2329 removes any doubt, and that the performance of annual work is required as well upon the one class of claims as upon the other. In Section 2329 it is declared that claims usually called *placers*, including all forms of deposit, excepting veins of quartz, or other rock, in place, shall be subject to entry and patent, *under like circumstances and conditions, and upon similar proceedings*, as are provided for vein or lode locations. We think the effect of this section is to declare that the circumstances and conditions under which vein or lode claims may be entered and patented shall be likewise applicable to *placer* claims; that as a location of a vein or lode claim may be kept alive for the purpose of entry and patent only by the performance of the requisite amount of annual work, so a *placer* claim must be kept alive for the same purpose in the same manner. The Act of January 2, 1880, (21 Stat. at Large, 61,) amending Section 2324, Revised Statutes, is in harmony with this view, in speaking, as it does, of "the vein, lode, ledge, or deposit sought to be patented."

Judgment reversed and cause remanded, with instructions to render judgment for defendant as to the lands within its location.

We concur: Morrison, C. J., Sharpstein, J.

IN BANK.

[Filed December 22, 1882.]

No. 7918.

HAWLEY, APPELLANT,

VS.

CAMPBELL ET AL., RESPONDENTS.

INSOLVENCY—PARTNERSHIP—INDIVIDUAL DEBTS. Under the Insolvency Act of May 4, 1852, (Stats. 1852, p. 69.) and the Act amendatory thereof and supplemental thereto, an individual member of a partnership firm could be discharged from his individual liability for firm debts.

ID.—CASES DISTINGUISHED. *Meyers vs Kohlman*, 8 Cal. 44; *California Furniture Company vs. Halsey*, 54 id. 315; *Glenn vs Arnold*, 56 id. 631; *Freeman vs. Campbell*, id. 639; and *In re Baker & Hamilton*, 55 id. 302, distinguished.

Appeal from Superior Court, Colusa County.

J. T. Harrington, for appellant.

Hart, Swinford, and Hamilton, for respondents.

Ross, J., delivered the opinion of the Court:

Neither of the cases entitled, respectively, *Meyers vs. Kohlman*, 8 Cal. 44, *California Furniture Company vs. Halsey*, 54 Cal. 315, *Glenn vs. Arnold*, 56 Cal. 631, *Freeman vs. Campbell*, 56 Cal. 639, and *In re Baker & Hamilton*, 55 Cal. 302, went further than to hold that by the Insolvent Act of May 4, 1852, and the Act amendatory thereof and supplemental thereto, no provision was made for the relief of an insolvent partnership, and, as a consequence, that the Insolvency Court under those Acts could not administer partnership property nor prevent partnership creditors from subjecting such property to the payment of their debts. In none of the cases mentioned was it held that, under the Acts referred to, an individual member of a firm could not be discharged from his individual liability for firm debts. Nor, in our opinion, does such result necessarily or logically follow from the doctrine of those cases.

Inasmuch as the Insolvency Court has, under the Act of 1852 and the Acts amendatory thereof and supplemental thereto, no jurisdiction of a partnership or of partnership property, the creditors of such firm can lawfully pursue the firm property regardless of the insolvency proceedings. As long as there remains any partnership property, it is primarily liable for partnership debts. When those debts are paid, if anything remains of the partnership property, it belongs to the partnership; and in this each of the members of the firm have an interest. Such interest is liable for the individual debts of the individual members of the firm. But each member of the firm is also individually liable for all of the debts of the firm of which he is a member. When as an individual he seeks the benefit of the Act in question, he is required "to execute an assignment of all of his property, and to file a schedule setting forth, among other things, a full, complete and perfect inventory of all of his property, with a list of losses he may have sustained, giving the names of his creditors, if known, the amount due to each creditor, and the cause and nature of such indebtedness, and when it accrued." His individual interest in the residuum of the partnership property, if any, is included in this schedule and assignment; and when such assignment is made in good faith and without fraud, the insolvent debtor may, in our

opinion, be discharged from all individual liability for partnership as well as other debts. The language of the statute is: "Every insolvent debtor may be discharged from his debts," etc. A partnership debt for which he is individually liable is as much "his" debt as is any other individual debt he may owe, and to hold that from the former he cannot be discharged would be to import into the statute an exception not there made, and not authorized, nor indeed called for, for the protection of the partnership creditors, since, as we have seen, they may pursue the partnership property without regard to the insolvency proceedings.

Judgment affirmed.

We concur: Thornton, J., Myrick, J., Morrison, C. J., McKinstry, J., McKee, J.

I dissent: Sharpstein, J.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 8570.

HORGAN, RESPONDENT, VS. AMICK, APPELLANT.

HOMESTEAD — EXECUTION — EXEMPTION — CROP — GRAIN. The question, as stated by the Court, "Is grain which was harvested from lands constituting a homestead (lands which before the declaration of homestead were community property) exempt from execution for debts of the husband?" *held*, all the products of the homestead are not *in terms* made to constitute a portion of the homestead. Reading our homestead laws in connection with Section 690 of the Code of Civil Procedure, it seems clear that the Legislature intended that the whole crop of grain raised upon a homestead farm, without reference to its quality, should not be exempt from execution.

Id.—Id. It would be giving a strained interpretation to the language of the third subdivision of Section 690 C. C. P. to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed-grain to the value of \$200. It is obvious it is meant that only grain to that amount shall be exempt.

Appeal from Superior Court, Yolo County.

Ball and Craig, for appellant.

W. B. Treadwell, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Is grain which was harvested from lands constituting a homestead (lands which before the declaration of homestead were community property), exempt from execution for debts of the husband?

All the products of the homestead are not *in terms* made to constitute a portion of the homestead. It is urged that homestead laws are framed upon considerations of public

policy, beneficial in their nature, and ought to be liberally expounded. We agree that such laws should be construed in such manner as shall further the object intended to be attained, and as will include within the exemption all things coming within the spirit of the law, except where such construction is contrary to the evident meaning of the statute; or (where the statute is silent) of other statutes bearing upon the subject.

But reading our homestead law in connection with Section 690 of the Code of Civil Procedure, it seems clear that the Legislature intended that the whole crop of grain raised upon a homestead farm, without reference to its quantity, should not be exempt from execution. The third subdivision of the section of the Code of Civil Procedure referred to reads:

"The farming utensils or implements of husbandry of the judgment-debtor; also, two oxen, or two horses, or two mules, and their harness; one cart or wagon, and food for such oxen, horses, or mules, for one month; also, all seed, grain, or vegetables, actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars, and seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business."

It would be giving a strained interpretation of the language of the foregoing to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed-grain to the value of two hundred dollars. It is obvious it is meant that only grain to that amount shall be exempt.

It does not appear that the statutes of Georgia, under which *Marshall vs. Cook* (46 Ga.) was decided, were like ours.

Judgment reversed.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed December 21, 1882.]

No. 6993.

HILL, APPELLANT, vs. FINNIGAN, RESPONDENT.

PLEDGE—PURCHASE BY PLEDGE—CONVERSION—SALE—RATIFICATION—CONSENT. A pledgor may consent to or ratify a purchase made by pledgee at public auction.

Id.—INSTRUCTIONS. In effect, the Court told the jury that the "direct dealing" mentioned in the statute (C. C. 3010) must precede the sale, must be something that changes the form of the original contract, and must have a consideration to support it. *Held:* In each particular, the instruction is erroneous. In the first place, it entirely excludes the question of ratification. In the second place, the instruction exacts proof of the elements necessary to make a new contract. Obviously such is not the meaning of the statute. The section was undoubtedly enacted for the protection of the pledgor—to the end that no unfair advantage be taken of him. It prohibits a pledgee or pledgeholder from purchasing the property pledged "except by direct dealing with the pl-dgor." By such dealing with the pledgor, the pledgee may purchase it. If the pledgor chooses to do so, he may consent that the pledgee buy at the public sale. Such consent may be given either at the time of making the pledge or at any subsequent time, without changing "the form of the original contract," and without consideration.

Id.—Id. The Court below also erred—particularly in view of the circumstances appearing in this case—in instructing the jury as follows: "The object of this law is for the purpose of guarding against the greed and rapacity of money-lenders and those who deal in securities of this character;" and again: "There are very many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors."

Appeal from Fifteenth District Court, San Francisco.

Lloyd & Newlands, Wood, Wallace, and Sharp, for appellants.

Stunly, Stoney & Hayes, and Campbell, for respondent.

Ross, J., delivered the opinion of the Court:

There was some testimony tending to show that the plaintiff not only consented that the defendant might purchase the property at the sale, but requested him to do so, and some testimony tending to show a ratification of the sale by the defendant, if it admitted of ratification. Sections 3001 *et seq.* of the Civil Code provide for the sale of pledged property at public auction, and by Section 3010 it is declared: "A pledgee or pledge-holder cannot purchase the property pledged, except by direct dealing with the pledgor."

The Court below instructed the jury: "That means by something subsequent to the sale, not sub—not subsequent to the sale, but it must be something that changes the form of the original character, and it must be for a consideration."

In effect, the Court told the jury that the "direct dealing" mentioned in the statute must precede the sale, must be something that changes the form of the original contract, and must have a consideration to support it.

In each particular the instruction is erroneous. In the first place, it entirely excludes the question of ratification.

There can be no doubt that a sale made by a pledgee in contravention of the provisions of the statute may be ratified by the pledgor; and it has been expressly so decided by this Court in the case of *Child vs. Hagg*, 41 Cal. 512. In the second place, the instruction exacts proof of the elements necessary to make a new contract. Obviously such is not the meaning of the statute. The section was undoubtedly enacted for the protection of the pledgor—to the end that no unfair advantage be taken of him. It prohibits a pledgee or pledge-holder from purchasing the property pledged, “except by direct dealing with the pledgor.” By such dealing with the pledgor, the pledgee *may* purchase it. Why should it be held that by this is meant that the pledgee or pledge-holder can only purchase by taking a direct transfer from the pledgor? The statute does not say so, and the reason of the prohibition suggests the contrary. If the pledgor chooses to do so, we see no reason why he may not consent that the pledgee may buy at the public sale. In some cases it may be to his interest that this be done. Such consent may be given either at the making of the pledge or at any subsequent time without changing “the form of the original contract” and without consideration.

The Court below also erred—particularly in view of the circumstances appearing in this case—in instructing the jury as follows: “The object of the law is for the purpose of guarding against the greed and rapacity of money-lenders and those who deal in securities of this character;” and again: “There are many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors.”

This was manifestly improper. No one can measure the extent of the influence upon the jury of such instructions coming from the Court. The defendant was entitled to a fair trial. He did not have it in the Court below, and we cannot permit the judgment to stand.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., Myrick, J.

I concur in the judgment: McKee, J.

CONCURRING OPINIONS.

We concur in the judgment on the first point discussed in the opinion: Thornton, J., McKinstry, J.

I concur: The instruction first referred to in the opinion of Mr. Justice Ross is, in my opinion, clearly erroneous. Upon the other question discussed in the leading opinion I express no opinion.

SHARPSTEIN, J.

DEPARTMENT No. 1.

[Filed November 27, 1882.]

No. 8584.

GRIDLEY, ADMINISTRATRIX, ETC., APPELLANT,

VS.

BOGGS ET AL., RESPONDENTS.

TRUST—INSANITY—DEED—CONTRACT—FINDING—CONFLICTING TESTIMONY.

Action commenced by George W. Gridley in his life-time and prosecuted by plaintiff, administratrix of his estate, to obtain a decree setting aside a deed made by Gridley, and also an accompanying contract declaring trusts, etc. The fraud charged upon defendants especially named is that, taking advantage of the weak, feeble and diseased condition of mind of Gridley, and of his consequent incapacity to protect his own interests, they induced him, by false representations, to execute the deed and enter into the contract sought to be annulled. The representations had relation to matters in respect to which Gridley was fully informed and must have acted responsibly, provided he was a person of sound mind, on which latter question the Court below found in favor of defendants on a substantial conflict of evidence.

ID.—EVIDENCE—WITNESS—CROSS-EXAMINATION—EXPERT MEDICAL TESTIMONY.

To the objection that the Court erred in sustaining an objection to a hypothetical question propounded by plaintiff's counsel on cross-examination to the expert witness, Dr. C. F. Buckley, *held* (after reciting the evidence of plaintiff's witnesses, Dr. Miller, and the evidence of Dr. Buckley on his direct examination), the testimony of Dr. Buckley was addressed to the contradiction of the theory of Dr. Miller, that the diseased condition of the membranes of the brain was produced by slow uræmic poisoning, and such condition indicated insanity in Gridley, which extended backward from his death for a period of time including the acts alleged to have been done by him while incompetent to protect his business or other interests. *Further*, the objection that the question could not be asked in accordance with any legitimate rule of cross-examination was properly sustained.

ID.—ID. The Court is not prepared to say, but there is evidence in the transcript tending to prove the existence of each of the facts assumed in the question.

ID.—ID. The burthen of showing that Gridley was insane when and before the instruments were executed was cast upon plaintiff. Taking up this burthen, and in making out her affirmative case, plaintiff, in addition to other evidence, had propounded a series of hypothetical questions to expert witnesses called on her behalf. The question put to Dr. Buckley was of the same character, and in substance the same, as one put to plaintiff's witnesses, and his answer, if it sustained plaintiff's view, would have constituted part of plaintiff's case, which should have been made out before she rested. His direct examination had been limited to the expression of his opinion as to the correctness of the theory of Dr. Miller, one of plaintiff's witnesses—a theory based upon certain conditions of the bodily organs as the same appeared at the post-mortem. The question put by plaintiff was much broader than was justified by the matters drawn out on the direct examination.

Id.—Id. Nor can the question be justified as testing the capacity of the expert. If the answer of Dr. Buckley had been the same as that given by plaintiff's experts, it would have strengthened plaintiff's affirmative case; if it had been different, it would no more tend to prove the incompetency of Buckley than it would tend to prove the incompetency of the experts called by plaintiff.

Id.—JUDGMENT—WILL—INSANITY—STATUS. The Court did not err in sustaining defendants' objection to plaintiff's offer to introduce in evidence a document, filed in the Superior Court, purporting to be the last will and testament of Gridley, deceased, together with the objections to the probate of the same by certain parties, and the Court's findings of fact and conclusions of law thereon, and the decree of said Court thereon rejecting said will "and deciding that said George W. Gridley was unsound in mind and incompetent by reason thereof to make a will at the date of the execution thereof." The proceeding was not a special inquiry to determine his status as to sanity or insanity. (1908 C. C. P.)

Appeal from Superior Court, Butte County.

York & Whitworth, for appellant.

Lusk, Belcher & Belcher and *Jones*, for respondents.

MCKINSTRY, J., delivered the opinion of the Court :

The action, commenced by George W. Gridley in his lifetime, is prosecuted by plaintiff, appellant, as the administratrix of his estate, to obtain a decree setting aside a deed made by him September 4, 1879, to certain of the defendants (John Boggs, E. B. Pond and C. W. Clarke), and also an accompanying contract, executed by them, declaring trusts in favor of named creditors of said George W. Gridley and one D. M. Reavis.

The complaint alleges that for more than five years next before the first day of December, 1880, George W. Gridley was continuously feeble and diseased in body, and feeble and weak and unsound in mind, and by reason thereof during all that time "wholly incompetent to transact business." That during such five years all the defendants had full knowledge of said Gridley's feeble and diseased condition of body, and his said weak and unsound condition of mind, and that he was so, as aforesaid, "wholly incompetent to transact business." That during such five years, prior to December 1, 1880, and while the said defendants, Boggs, Pond, Clarke and Reavis, were each and all of them fully cognizant of said George W. Gridley's said weak, feeble and diseased condition of body, and his said weak, feeble and unsound condition of mind, "and of his said incompetency to transact business," they conspired, confederated and colluded together to take an unfair and fraudulent advantage of him, "while in his said feeble and diseased condition of body, and while in his said weak, feeble and unsound condition of mind, and

while he was so incompetent to transact business, to wrong, cheat and defraud him out of his said property" (previously described), "and to that end, and with that intent, they wrongfully, fraudulently and falsely represented to said George W. Gridley that he was liable to pay to said Boggs, Pond, Clarke, and to certain other of the defendants, moneys due to them on certain promissory notes, all, or nearly all, signed by him and by said D. M. Reavis," etc., etc.

The fraud charged upon the defendants especially named is that, taking advantage of the weak, feeble and diseased condition of the mind of George W. Gridley, and of his consequent incapacity to protect his own interests, they induced him, by false representations, to execute the deed and enter into the contract sought to be annulled.

The representations alleged to have been made to Gridley (with the exception, perhaps, of the alleged representation that Reavis had conveyed all his property to Boggs, Pond and Clarke, in reference to which the Court below found upon evidence that no such representation was made, but, to the contrary thereof, that the fact as to conveyance from Reavis to Boggs, Pond and Clarke was stated to Gridley), had relation to matters in respect to which he was fully informed, and must have acted responsibly, provided he was a person of sound mind.

The Court below found: "For the five years next before the 1st day of December, 1880, the plaintiff's intestate, George W. Gridley, was not either feeble or diseased in body, or feeble, or weak, or unsound in mind, and was not during all, or *any portion*, of that time incompetent to attend to, manage or transact business; but, on the contrary, was during all said time, and up to the time of his death, of sound, healthy and vigorous and unimpaired condition of mind and body, and fully competent to transact business."

It is admitted that as to this finding there was a substantial conflict in the evidence.

In argument counsel indulged in much criticism, some of it perhaps just, of the findings. It is obvious, however, in presence of the explicit findings, that Gridley was of sound mind, and further, that defendants practiced no such arts or devices as constitute fraud when practiced upon a person of sound mind; the judgment must be affirmed, unless errors occurred at the trial.

It is contended that the Court below erred in sustaining the objection to the hypothetical question propounded by plaintiff's counsel on cross-examination to the expert witness, Dr. C. F. Buckley.

Dr. P. B. M. Miller, an expert witness called on behalf of the plaintiff, had testified that he had made a post-mortem examination of the body of George W. Gridley, and as to the condition of the brain, pelvic viscera, and particularly the kidneys and bladder, and the prostate gland and the urethra; that he had found nitrate of urea in crystals in washing the membranes of the brain, and crystals of urea in the arachnoid sac, etc.; that the kidneys were apparently in the normal state, except that they were engorged with blood; that the membranes of the brain, the *pia mater*, were "thickened, discolored, adherent, and matted together;" that the prostate gland was enlarged, thickened and indurated, and its walls pressed together. In his opinion the deceased must have been of unsound mind for five or six years prior to his death, by reason of the facts that the condition of the prostate gland had obstructed the elimination of urea, causing it to enter in the circulation and poisoning the cranial membranes, and that the patient died of uræmic convulsions thus produced; that the thickened condition of the brain coverings established insanity, and that the thickening produced by the chronic uræmic poisoning must have been gradual, continuing several years.

In his direct examination on behalf of defendants, Dr. Buckley, after stating that he had been a practicing physician and surgeon since 1864, that he was a graduate of certain medical schools, and that he had been superintendent for about two years of an insane asylum in Lancashire, England, proceeded to testify in effect that he had never known crystals of urea to be found in the brain or any of its surroundings; that nitrate of urea is perfectly soluble in water; that uric and urea are specifically different. He added that, taking the condition of the coverings of the brain and the brain itself, and of the kidneys, the bladder, the prostate gland and the urethra, as described by Dr. Miller (and Dr. Caldwell, who assisted at the post-mortem), he could not understand how any such condition of his brain or its membranes could be attributed to uræmic poisoning without disease of the kidneys antedating it, and declared that disease or unsoundness of mind *could not be predicated* on the condition of the coverings of the brain as described by Messrs. Miller and Caldwell.

It is apparent from the foregoing that the testimony of Dr. Buckley was addressed to the contradiction of the theory of Dr. Miller that the diseased condition of the membranes of the brain was produced by slow uræmic poisoning, and such condition indicated insanity in Gridley, which extended back-

ward from his death for a period of time including the acts alleged to have been done by him while incompetent to protect his business or other interests.

It is disputed between counsel for the respective parties whether there was any evidence in the case tending to prove some of the facts assumed to exist in the hypothetical question propounded, on the part of plaintiff, upon the cross-examination of Dr. Buckley; the sustaining of the objection to which by the Court below is now here urged as error.

After such examination as we have been able to give the enormous transcript of nearly *six thousand folios*, made up to a great extent of the questions and answers contained in the short-hand reporter's notes—and we consented to hear the appeal upon the unnecessarily voluminous record only out of consideration for the important interests involved—we are not prepared to say but there is to be found in it some evidence tending to prove the existence of each of the facts assumed in the question.

But the objection that the question could not be asked in accordance within any legitimate rule of cross-examination was properly sustained.

The burthen of showing that George W. Gridley was insane when and before the instruments were executed was cast upon the plaintiff. Taking up the burthen and in making out her affirmative case, plaintiff, in addition to other evidence, had propounded a series of hypothetical questions to expert witnesses called on her behalf. The question put to Dr. Buckley was of the same character and in substance the same as one put to plaintiff's witnesses, and his answer, if it sustained plaintiff's views, would have constituted part of plaintiff's case, which should have been made out before she rested. His direct examination had been limited to the expression of his opinion as to the correctness of the theory of Dr. Miller, one of plaintiff's witnesses—a theory based upon certain conditions of the bodily organs, as the same appeared at the post-mortem. The question put by plaintiff was much broader than was justified by the matters drawn out on the direct examination. Nor can the question be justified as testing the capacity of the expert. If the answer of Dr. Buckley had been the same as that given by plaintiff's experts, it would have strengthened the plaintiff's affirmative case; if it had been different, it would no more tend to prove the incompetency of Buckley than it would tend to prove the incompetency of the experts called by plaintiff.

Appellant also claims the Court below erred in sustaining defendants' objection to plaintiff's offer to introduce in evi-

dence a document filed in the Superior Court on the 14th day of March, 1881, purporting to be the last will and testament of George W. Gridley, deceased, together with the objections to the probate of the same by Charles W. Gridley and Flora D. Harris, and the Court's findings of fact and conclusions of law thereon, and the decree of said Court thereon rejecting said will, "and deciding that said George W. Gridley was unsound in mind and incompetent by reason thereof to make a will at the date of the execution thereof, to wit, March 26, 1879."

It is said the judgment was conclusive as to Gridley's mental condition, or was at least *prima facie* evidence of his mental condition on that day.

Section 1908 of the Code of Civil Procedure reads:

"The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this State or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person."

With respect to a judgment in a proceeding *de lunatico inquirendo*, it was said in *L'Amoureux vs. Crosby* (2 Paige, ch. 427) that as to the acts done by the lunatic before the issuing of the commission, and which were overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. It would seem that acts done after the finding of the inquisition, in the absence of the statute, would be only presumptive evidence. (*Van Deusen vs. Sweet*, 51 N. Y. 386; *Rider vs. Miller*, 86 *id.* 511; *Gibson vs. Soper*, 6 Gray, 285-6; *Rippy vs. Gant*, 4 Ired. Eq. 443; *Griswald vs. Miller*, 15 Barb. 523, and cases there cited.) But there can be no doubt that, under the section of the Code of Civil Procedure above quoted, the judgment in a proceeding whose direct purpose and end is to obtain a determination "of the personal, political or legal condition of a particular person" is conclusive upon such condition.

Was the judgment rejecting the will such a judgment?

Mr. Starkie says: "In many instances a Court possesses a jurisdiction which enables it to pronounce on the nature and qualities of the particular subject-matter, where the proceeding is, as it is technically termed, *in rem.*; as where the

Ordinary or Court Christian decides upon a question of marriage or bastardy; or the Court of Exchequer upon condemnations; or the Court of Admiralty upon questions of prize; or a Court of Quarter Sessions upon settlement cases. Decisions of this sort are for the most part binding and conclusive upon all the world." (Starkie, Ev., p. 36, 10th Am. Ed.) Such a judgment is conclusive, unless impeached for fraud, on those who were neither parties nor privies to it. (*Id.* 384.) And the reasons given by Professor Greenleaf are: "These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others—partly upon the ground that in most cases of this kind, and especially upon cases of property seized or proceeded against, every one who can possibly be affected by the decision has a right to appear and assert his own rights, *by becoming an actual party to the proceedings*; and partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful," etc. (1 Green. Ev. 525.)

If the defendants in the present cause are bound by the judgment of the Superior Court, as being a judgment declaring George W. Gridley to have been insane at the date of the offered will, it must be upon "the more general ground" mentioned by Mr. Greenleaf. Certainly all those who might be affected by a judgment that Gridley was insane when the will was executed did not have the right to appear and assert their rights in the proceeding for the probate of the will. The legal notice of that proceeding ran only to those interested in Gridley's estate. And as to "the more general ground," public policy only requires, at most, that a judgment as to the *status* of a particular person, which shall be conclusive as against those not parties to it, shall be a judgment which simply determines such *status* in a proceeding whose sole end and aim is to determine it. The judgment of the Superior Court determined that a certain instrument, purporting to be the last will and testament of George W. Gridley, was not his last will and testament. The proceeding was not a special inquiry to determine his *status* as to sanity or insanity. The finding of insanity was of a probative fact, upon which the Court held the will to be invalid, as it might have held it to be invalid upon proof of duress or undue influence.

If there remains doubt of the correctness of this conclusion, it should be dispelled by the wording of the section of the Code of Civil Procedure. There a judgment "in respect

to the probate of a will " is spoken of as a separate and distinct thing from a judgment "in respect to the personal, political or legal condition or relation of a particular person." It would be difficult more explicitly to declare that a judgment in respect to the probate of a will should be evidence that the offered instrument had been rejected or admitted to probate—that it was or was not the last will and testament of the decedent—neither more nor less.

We find no substantial errors in the record.

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed November 28, 1882.]

No. 10,760.

PEOPLE, RESPONDENT, VS. YE PARK, APPELLANT.

ASSAULT WITH INTENT TO COMMIT MURDER—SELF-DEFENSE—FLIGHT—INSTRUCTIONS. The Court instructed the jury: "If you believe from the evidence that defendant had sufficient cause, from the conduct of Chun Tan, to believe that he, the defendant, was in imminent danger of his life, or of great bodily harm from Chun Tan, then the defendant had a right to use all lawful means to secure his own safety; *but if the testimony shows that the defendant could have more readily avoided danger to himself by flight than in any other way, then an assault by him is not justifiable.*" Defendant excepted to the portion italicized. Held, the exception was well taken.

ID.—ID. Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if necessary, kill his adversary. It is otherwise in case of mere assault and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart.

ID.—ID. The jury could not have been misled by the other instructions complained of. Another instruction claimed to be erroneous was cured by one given at the request of defendant. The latter supplemented the former and cured the error complained of.

ID.—ID. Conceding that the question as to what issues were "immaterial" was one of law, the Court did not submit such question to the jury.

ID.—ASSAULT—WEAPON—WOUND. It is not improper for the jury to consider the character of the weapon and the nature of the wound while deliberating upon the questions of premeditation, malice aforethought and intent to kill.

ID.—FEARS. The Court properly refused the instruction: "If you believe, from all the evidence, the circumstances were such as to excite the fears of a reasonable man, and the defendant in this action acted under such fears when he made the assault upon Chun Tan, even though the defendant was mistaken in the circumstances, and they turned out to be false, you will acquit him." In order to justify a homicide under the circumstances stated, the circumstances must not only be sufficient to excite the fears of a reasonable person, but the party killing must have acted under the influence of such fears alone.

Appeal from Superior Court, Mono County.

Bennett & Reddy, for appellant.

Attorney-General Hart, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The first ground upon which it is contended that this judgment should be reversed is that the Court erred in instructing the jury that if they found that the defendant and one Toy Ping were living together "as man and wife in meretricious union, that such union as a matter of law would not be sufficient to give defendant the right or power to control or restrain the acts and liberty or power of locomotion of said Toy Ping; that in such a union either the man or woman has a perfect right to go and come as he or she pleases, unrestrained by the other." As an abstract proposition the correctness of what the Court said is not disputed. But the defendant's counsel insists that there was no evidence that the defendant and said Toy Ping were living together "in a meretricious union," and, therefore, it was error for the Court to state what their relative rights would be in case the jury should find that they were so living together. And it is claimed that the defendant's case might have been prejudiced by instructions which were apparently based upon the assumption that there was evidence which, at least, tended to prove that such a union had existed between the defendant and said Toy Ping. As there was no such evidence, it is urged that the instructions were calculated to mislead the jury.

If the defendant would have had "the right or power to control or restrain the acts and liberty or power of locomotion of said Toy Ping," if they had not been living together in a meretricious union, we could readily see that the jury might have been misled by the instructions referred to in this connection. But we do not understand that if the parties had been living together in a *meritorious* union, that either would have had the right or power "to control or restrain the acts and liberty or power of locomotion" of the other, and therefore cannot see that the jury could have been misled by said instructions.

The Court doubtless erred in charging the jury "that the Supreme Court of this State" had said "that assault to commit murder is the attempt to kill a person, coupled with the present ability to do so." That instruction does not contain a full definition of the crime with which the defendant was charged, but the Court, in another instruction given at the request of the defendant's counsel, did give a correct

and full definition of that crime. We think that the latter supplemented the former, and cured the error complained of.

The instruction "that a conflict of testimony on immaterial questions should not be considered" by them without telling the jury what questions were immaterial, is objected to on the ground that it "left to the jury the question as to what was or was not an immaterial issue or question," which was a question of law for the Court and not for the jury to determine. Conceding that the question was one of law, we are not prepared to say that the Court submitted such question to the jury.

The Court was requested by the defendant to give, and did give, the following instruction: "Before you can find the defendant guilty of the charge laid in the information, you must be convinced beyond a reasonable doubt, by the evidence produced on the part of the prosecution, that the defendant in this case, with premeditation and malice aforethought, made the assault upon Chun Tan with the intention then and there to murder him;" and then added the following: "Two elements for your consideration on this point are the character of the weapon and the nature of the wound."

It is claimed by defendant's counsel that the jury might have been misled by the addition of this clause to the instruction which he requested the Court to give. We do not think so. Nor can we see that it would be improper for the jury to consider the two elements mentioned by the Court while deliberating upon the questions of premeditation, malice aforethought and intent to murder.

We do not think that the Court erred in refusing to give the following instruction asked by the defendant: "If you believe from all the evidence that the circumstances were such as to excite the fears of a reasonable man, and the defendant in this action acted under such fears when he made the assault upon Chun Tan, even though the defendant was mistaken in the circumstances, and they turned out to be false, you will acquit him." In order to justify a homicide under the circumstances stated, the circumstances must not only be sufficient to excite the fears of a reasonable person, but "the party killing must have acted under the influence of such fears *alone*."

Another instruction to which exception is taken reads as follows: "If you believe from the testimony that defendant had sufficient cause, from the conduct of Chun Tan, to believe that he, the defendant, was in imminent danger of his life, or of great bodily harm from Chun Tan, then the defendant had a right to use all lawful means to secure his

own safety; but if the testimony shows that the defendant could have more readily avoided danger to himself by flight than in any other way, then an assault by him is not justifiable." The defendant excepts to the portion of the instruction which we have italicized, and we think that the exception is well taken.

"Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and if necessary kill his adversary." (Bishop's Criminal Law, 850.) It is otherwise in case of mere assault and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart. (*Id.*) Assuming, however, as the Court did in this instance, that the defendant had sufficient cause from the conduct of Chun Tan to believe that he, the defendant, was in imminent danger of his life or great bodily harm from Chun Tan, it was not incumbent on the defendant to fly for safety, even if he might more readily have secured it by flight than by standing his ground, and, if necessary, killing his adversary.

This entire instruction is extremely faulty. The jury, in one part of it, is, in effect, told that a man in defense of his life has "a right to use all *lawful means* to secure his own safety;" but the jury was not informed as to what would be *lawful means* under such circumstances, although the jury might have inferred from the language of the Court that if the defendant could not have saved his life by flight *an assault* would be justifiable. But whether the Court meant a simple assault or a more serious one, does not appear. The right of self-defense is quite as sacred as any other, and assuming that the defendant was placed in the position which, for the purposes of this instruction, he was assumed to be in, the instruction, as a whole, does not fully state his rights, and was calculated to mislead the jury as to them. For this error the judgment and order denying the motion for a new trial must be reversed.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed December 14, 1882.]

No. 8397.

CAREY, RESPONDENT, VS. BROWN, APPELLANT.

TRUST DEED—RECITALS—SALE—FRAUD—EJECTMENT. Defendant formerly owned the premises and executed a trust deed to secure a loan, and such trust deed provided that in default of payment, and in the event of a sale, the recitals in any deed executed by the trustees should be

conclusive evidence of the truth of the facts recited. *Held*, in the absence of fraud, defendant is concluded by the recitals in a deed executed by the trustees.

ID.—ID.—TRUST—NOTICE. One of the trustees became the owner by assignment of the note executed by defendant, and the claim was that such trustee had no right to sell the trust property for his own benefit. *Held*, as the purchaser of the property at the trustees' sale had no notice of the assignment of the note to the trustee, and as such purchaser believed the sale was made regularly for the benefit of the payee of the note, his title was not affected by the fact that the trustee was dealing with the trust property for his own benefit.

ID.—CHECK—GOLD COIN. The purchaser paid for the property with a check instead of gold coin, as provided in the deed of trust. *Held*, as the money was actually paid on the check, defendant's objection to the sale was not well taken.

PRACTICE—AMENDMENT—ANSWER. Defendant was not prejudiced by the refusal of the Court to allow a proposed amendment to the answer, for the reason that the amendment would not have helped his case.

Appeal from Superior Court, Sacramento County.

Alexander and Devine, for appellant.

Freeman & Bates, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the 16th day of June, 1880, the defendant was indebted to one P. Bohl in the sum of seven hundred dollars, as was evidenced by a promissory note of that date, and for that amount, payable in six months, and to secure such indebtedness, the defendant executed a deed of trust to W. A. Fountain and A. Leonard on the certain lots of land in controversy, situate in the city of Sacramento. The deed of trust authorized the trustees therein named to sell the property in case defendant failed to pay the note when due, and provided that in the event of a sale the recitals in any deed executed by the trustees, of default on the part of the defendant to pay the note, and of the application of the payee of the note for the sale of the premises, and of publication of the notice of sale required by the trust deed, should be *conclusive evidence* of the facts recited. The language is: "Any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part (the defendant herein), his heirs, assigns and all other persons; and the receipt for the purchase-money contained in any deeds executed to the purchaser shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase-money according to the trusts aforesaid."

The property was sold in the presence and by the direction of Fountain, one of the trustees, and a deed was executed by both of the trustees to the purchaser on the 22d day of September, 1881, and the deed recites "that on the

— day of July, 1881, the said promissory note having long prior thereto become due, and said W. K. Brown having made default in the payment of the principal and interest of said note, and the holder of the same having made application to the parties of the first part, requiring them (the trustees) to sell the whole of said real estate, and said parties of the first part did, on the 26th day of August, 1881, cause notice of the time and place of sale to be published in the *Sacramento Daily Record-Union*, a newspaper printed and published in the county where said lands were situate, in which notice the 17th day of September, 1881, at the Court-house door, in said county, at the hour of ten o'clock A. M., was fixed as the time and place when and where said premises would be sold at public auction, under the provisions of said trust deed. That said notice was published one time each week for three successive weeks previous to said day of sale in said newspaper. That on the 17th day of September, 1881, at the hour of ten o'clock A. M., at the Court-house door, in said county, the said trustees sold at public auction, for cash in gold coin, said land and premises to the highest bidder therefor. That at such sale the said party of the second part was the highest bidder and best bidder," etc.

The foregoing deed was executed to one Weyant, and he executed a deed to the plaintiff.

1. It appears from the evidence in the case that Bohl, the payee of the note, to secure the payment of which the deed of trust was given, assigned the note to Fountain, one of the trustees, on the 27th day of September, 1880, and on the trial of the case the defendant offered to prove that neither Bohl nor any other person ever made any application to Leonard or Fountain (the trustees) to sell the land to satisfy the indebtedness secured thereby; but objection was made to the introduction of such evidence, and it was excluded by the Court.

It is expressly provided in the deed of trust that any recitals contained in a deed executed by the trustees to a purchaser of the trust property shall be *conclusive evidence* of the truth of the facts recited; and under the circumstances developed on the trial of this case the defendant was concluded thereby. It is true that the answer charges fraud and collusion on the part of the plaintiff and the trustees, but there is no evidence in the transcript sustaining such charge; and the finding of the Court was the other way.

2. The next point in the case deserving of notice is the fact that Fountain, one of the trustees, became the owner by assignment of the note executed by the defendant to Bohl,

and it is claimed that he had no right to sell the trust property for his own benefit. By Section 2263 of the Civil Code it is provided that "a trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent Court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same." If the contest in this case was between the defendant and the trustee, it is very plain that the trustee could claim nothing by virtue of the sale; but it does not appear that the purchaser of the property at the trustees' sale had any notice of the assignment of the note to the trustee; and, so far as the proceedings in the case show, the purchaser believed, and had a right to believe, that the sale was made regularly and for the benefit of Bohl, the payee of the note. We think that in the absence of all knowledge of the unlawful dealings of the trustee, the title of the purchaser was not affected by the fact that the trustee was dealing with the trust property for his own benefit.

3. There are two other points that may be noticed together:

The defendant was not prejudiced by the refusal of the Court to allow a proposed amendment to the answer, for the reason that the amendment would not have helped the defendant's case; and the other point, that the purchaser paid for the property with a check instead of gold coin, as provided in the deed of trust, is not well taken. It appears from the evidence not only that a check was given, but that the money was actually paid on the check.

Judgment and order affirmed.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed December 20, 1882.]

No. 7556.

MARTIN, APPELLANT,

VS.

THOMPSON ET AL., RESPONDENTS.

ACTION — RIFLEVIN — GRAIN — ADVERSE POSSESSION — LAND. An action to recover the possession (or the value thereof) of certain grain sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual, adverse and exclusive possession, cannot be maintained.

ID.—AMENDED COMPLAINT—PRACTICE. The lower Court did not abuse its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any copy of the proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file.

Appeal from Superior Court of San Francisco.

L. Aldrich, for appellants.

M. Mullany, for respondent.

By the COURT:

The action is brought to recover the possession (or the value thereof) of certain *grain* sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual, adverse and exclusive possession. The action cannot be maintained.

In *Halleck, Executor, vs. Mixer* (16 Cal. 574), a demurrer to the complaint had been sustained in the Court below upon the ground that the complaint showed the title to land to be involved in such sense as precluded the action. The complaint alleged that the plaintiff's testator was seized and possessed of certain real estate at the time of his death, and that the executor, ever since his appointment, had been in possession of the same; that persons (whose names were not designated) had entered upon the lands without authority and cut down timber growing thereon, to the amount of three hundred cords; that defendant afterward also entered upon the premises, without authority, and removed the wood thus cut, and still detained it, etc. There was no suggestion or pretense that the defendant, or any other person than plaintiff and his testator, ever had possession of the land on which the wood was cut.

It was said by the Supreme Court, in reversing the judgment of the District Court, that the complaint in *Halleck vs. Mixer* did not show title to the land to be involved in such sense as to preclude the action. "In all cases where the owner of real estate sues for property severed from the freehold, the action must rest upon the proof in the first instance of title or right of possession (or possession) taken previous in the plaintiff; and, if the position of the respondent were tenable, no action for the recovery of said property would ever lie. If the complaint alleged the title, it would, upon his argument, be demurrable; if it merely alleged ownership of the property, the party *would be excluded* on the trial from the proof of his title, or be nonsuited on its production. The true rule is this: The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in

possession of the premises from which the property was severed—holding them adversely in good faith under claim and color of title, in other words: *The personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants.* But the rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is, as we have already observed, upon such proof that the right of recovery rests. * * * A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action." The Court then cites with approval *Harlan vs. Harlan*, 15 Penn. St. R. 513.

This was the case of *Harlan vs. Harlan*. The plaintiff was the purchaser of certain real estate, being a cotton manufactory. Certain machinery in the mill passed to him as a part of the freehold. A fixture, part of the machinery, was detached by the former owner, and it was held that the purchaser of the real estate could maintain replevin for it.

Certain cases were cited by counsel as authority to the point that the action would not lie, but Roger, J., commenting upon those cases, pointed out the distinction between them and the case then at bar.

In the case of *Harlan vs. Harlan*, the title to the real property was not *disputed* by the defendant, and the Court suggested that it might be that the mere assertion of a title would avail little. "The Court looks to the substance, and where it appears in truth it is a *trial of title* then it is properly ruled that replevin is not the proper action, but that it must be tried in another form."

It was said in *Elliott vs. Powell*, 10 Watts 453, as was also said in *Halleck vs. Mixer* (*supra*), it is a mistaken supposition that title to real estate may not be incidentally tried in a transitory action, much less that replevin cannot be maintained where the plaintiff can make title to the chattel only by making title to the land from which it was severed. (See, also, 12 John 140; 5 Marsh 341; Wm. Jones 243.) The cases cited by the Pennsylvania Court in *Harlan vs. Harlan* indicate the true rule. In *Mather vs. Trinity Church* (3 Serg. & R. 509), it was ruled that trover for gravel from land does not lie by one who has the right of possession against one who has the actual adverse possession "and sets up title to it"—that conflicting claims of title cannot be tried in the action of trover. To the same effect *Baker vs. Howell* and *Brown vs. Caldwell*, 6 Serg. & R. 476; 10 *id.* 114. The cases go to the point that where the property sued for has been severed from plaintiff's land, he can show his owner-

ship of the chattel by showing his ownership of the land, unless defendant has, and had when the property was severed from the freehold, adverse possession of the land claiming title thereto. Of course, to exclude plaintiff's right to sue for the personal property, defendant must have the *adverse possession claiming title*. If a tenancy or *quasi* tenancy exists, the defendant and occupant not claiming to be owner of the personal property, as owner of the realty, the reason for precluding the personal action does not exist. (*Harlan vs. Harlan, supra; Ferrand vs. Thompson, 5 B. & Ald. 826; Mooers vs. Wait, 9 Wend. 104.*)

But we find nowhere (except in *Kimball vs. Lohmas, 31 Cal. 159,*) that, with respect to the right of a plaintiff to resort to replevin, a distinction exists between a defendant in adverse possession of the land, claiming title by writing, and a defendant in adverse possession, claiming title without any written foundation for the claim. The distinction seems to have been suggested by a phrase employed in the opinion of *Halleck vs. Mixer*, with reference to a holding adversely "in good faith," etc.

But the case now before us differs in two respects from *Kimball vs. Lohmas*: First—The defendant claims a right to the possession under *color of title*. Second—The grain, the subject of the present controversy, was sown while defendant was in the adverse possession of the land. It did not exist, even potentially, while plaintiff had possession of the land—if plaintiff ever had possession of the land.

The present is also unlike the case of *Atherton vs. Fowler (96 U. S. 513)*. There the hay, the subject of controversy, was cut from the meadows *set in grass* by plaintiff's testator. And besides, in that case, the District Court of the State, "having given the law on the subject very clearly"—(in favor of plaintiff's right to maintain the action)—and inasmuch as it related to "a doctrine not affected by the Constitution or laws of the United States," the Supreme Court of the United States held, they "must take it to have been correctly expounded to the jury." (96 U. S., p. 515.)

There is no precedent for an action like the present, and no good reason why this should be made a precedent.

We cannot say the Court abused its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file.

Judgment and order affirmed.

Abstracts of Recent Decisions.

CONFLICT OF LAW—LOAN BY A CITIZEN OF ONE STATE TO CITIZEN OF ANOTHER. A citizen of one State may loan money to a citizen of another State and contract for the rate of interest allowed by the laws of the latter State, although the legal rate of interest allowed is greater in such State than in the State where the contract is made and in which it is to be performed. Where it appears upon the face of the contract that such was the intention of the parties, it constitutes an exception to the rule that the law of the place where the contract is made must govern in expounding and enforcing it. Where a citizen of New York loaned money to a citizen of Nebraska, secured by bond and mortgage on land in Nebraska, the money being furnished in New York and the mortgage being executed in Nebraska, and the statute of New York limiting the right to interest on loans at 6 per cent. per annum, and being highly penal, while the statute of Nebraska allowed the rate of 10 per cent. per annum, *held*, that the contract reserving 10 per cent. interest, the legal rate in Nebraska, was not usurious, notwithstanding that it was made in New York and was to be performed in that State. See *Arnold vs. Potter*, 22 Iowa 194; *Newman vs. Kershaw*, 10 Wis. 333; *Vilet vs. Camp*, 13 *id.* 221; *Robinson vs. Bland*, 2 Barr. 1077, U. S. Circ. Ct. Nebraska. *Kellogg vs. Miller*. (13 Feb. Rep. 198.) (24 Alb. L. J. 499).

NEGOTIABLE INSTRUMENT—TRANSFER BY ASSIGNMENT. Where the holder of a negotiable instrument payable to his order instead of indorsing it transfers title to it by a separate instrument which purports to "assign, sell, transfer and set over" the instrument, the assignee does not take the note freed from the equities, but it is subject to the same defenses that existed against it in the hands of the assignor. The note was transferable by indorsement, and was not transferred in that way but by assignment. The assignee obtained no title to enable him to sue except in the name of the payee. *Redmond vs. Stansbury*, 24 Mich. 445; *Robinson vs. Wilkinson*, 38 *id.* 299; *Aniba vs. Yeomans*, 39 *id.* 171. And hence no title sufficient to preclude the maker from setting up equities coeval with the inception of the paper. *Gibson vs. Miller*, 29 Mich. 355; *Franklin Bank vs. Raymond*, 3 Wend. 69; *Hedges vs. Sealey*, 9 Barb. 214; *Muller vs. Ponder*, 55 N. Y. 325; *Trust Co. vs. Nat. Bank*, 101 U. S. 68; *Moore vs. Miller*, 6 Or. 254; 25 Am. R. 518; *Haskell vs. Mitchell*, 53 Me. 468; *Clark vs. Whitaker*, 50 N. H. 474; 9 Am. R. 286; *Lancaster Nat. Bank vs. Taylor*, 100 Mass. 18; *Whistler vs. Forster*, 14 C. B. (N. S.) 248. Michigan Sup. Ct., April 5, 1882, *Spinning vs. Sullivan*, 26 Alb. L. J. 499.

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No. 21.

Current Topics.

The following amendment to Rule 17 of the U. S. Circuit and U. S. District Court, respecting costs, has just been made and filed:

Rule 17 of this Court is hereby amended so as to read as follows:

RULE 17, MEMORANDUM OF COSTS.—The party in whose favor a judgment at law or decree in equity is rendered, and who claims his costs, shall, within five days after the rendition of the verdict, or after notice of the decision of the Court, referee, or commissioner—or if the entry of judgment or decree on the verdict or decision is delayed by order of the Court, then before such entry is made—deliver to the clerk of the Court, and serve on the attorney or solicitor of the adverse party, a copy thereof, together with a notice of application to have the same taxed, a memorandum of his costs and necessary disbursements in the action or proceeding, distinctly specifying each item, so that the nature of the charge can be readily understood; which memorandum shall be verified by the oath of the party, or his agent, attorney or solicitor, or by the clerk of such attorney or solicitor, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding, and shall be accompanied by the evidence of service thereof, and of said notice, upon the attorney or solicitor of the adverse party.

Notice of the decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the Court, or the attorney or solicitor of the adverse party.

The notice shall specify the hour at which application to the clerk to tax the costs will be made, and shall not be less than one nor more than three days from the date of the notice. Upon a failure to file such memorandum, notice and evidence, the costs, other than the clerk's costs, (which may be inserted in the judgment or decree without such memorandum) shall be deemed waived.

In all cases where compensation is claimed for keeping personal property attached or taken on mesne process, the party delivering to the clerk such memorandum of costs shall annex thereto the petition of the marshal, under oath, fully setting forth the facts out of which such claim for compensation arose: stating the character, amount and value of the property attached or taken; the facts showing the necessity for employing a keeper, or renting a room, or other acts performed in keeping said property, and the reasonable necessary value of the services, in such manner that the Court can determine from the facts the proper compensation to be allowed. And the said facts so set out may be controverted by the opposing party in the mode provided in Rule 18, and thereupon the clerk shall allow and fix such amount as he shall deem reasonable, as in the case of other items of costs subject to appeal, as in other cases provided in these rules.

LORENZO SAWYER, Circuit Judge.

O. HOFFMAN, Dist. Judge.

January 15, 1883.

In a suit involving the liability of common carriers, the Supreme Court holds that in accordance with the common law, it is ruled that a carrier is responsible only for the extent of his own route and for safe storage or delivery to the next carrier. The Supreme Court also decides that all animals imported for breeding purposes must be admitted free of duty, regardless of Treasury regulation. Only animals of a "superior stock" will be admitted free.

Supreme Court of California.

IN BANK.

[Filed December 12, 1882.]

No. 8482.

NEHRBAS, RESPONDENT,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
APPELLANT.**NEGLECT—ACCIDENT—LOCOMOTIVE—BELL—TREES—TRAIN WHISTLE—**

EVIDENCE. Action by a father for damages for the loss of his five children, the eldest of whom was but sixteen and the youngest five years of age. The accident was caused by a locomotive colliding with a wagon in which the children were driving. *Held*, there was evidence going to show negligence on the part of the defendant; at the time of the accident the train was behind time, and running at a higher than the usual rate of speed; the bell was not rung nor the whistle blown; eucalyptus trees, planted by defendant along its track and within its right of way, prevented—in connection with some neighboring orchards—an approaching train from being seen by those approaching the highway until the traveler should reach a point very close to the railroad track; a wind was blowing, which caused the trees to rustle.

Id.—Id. The Court would not be justified in holding that the testimony was not such as entitled plaintiff to have it submitted to the jury, or that, being so submitted, it was not sufficient to support the verdict finding negligence on the part of defendant.

Id.—Id. There was not such contributory negligence on the part of deceased as precludes a recovery.

Id.—View. Where the view is obstructed so that parties crossing a railroad cannot see an approaching train, the exercise of greater care and caution is required on both sides. Those in charge of the train should approach the crossing at a less rate of speed and use increased diligence to give warning of its approach.

Id.—DILIGENCE—CHILDREN. It is by no means clear that the children could have escaped by the exercise of the utmost coolness and discretion. But in such cases such a degree of care is never required of those traveling a highway. Certainly the children were not bound to exercise more care than a prudent man approaching such a place would ordinarily exercise for his protection. There is no proof that they were heedless, and, under all the circumstances surrounding the accident, it was for the jury to determine whether they exercised that care which the law requires of them.

Id.—Id.—DAMAGES. The damages awarded—\$10,800—are not excessive.

Id.—Loss of SERVICE. In these cases the jury are not limited to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of his children.

- Id.—CONTRIBUTORY NEGLIGENCE.** If it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which Courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law to be decided by the Court. In all other cases, the question must be submitted to the jury under proper instructions.
- Id.—Id.** Contributory negligence on the part of the injured party is a matter of defense to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff.

Appeal from Superior Court, Alameda County.

W. H. L. Barnes, for appellant.
Foote and Moore, for respondent.

Ross, J., delivered the opinion of the Court:

Except in one aspect of the case we need not allude to the pathetic side of the accident which in an instant brought death to five children, the eldest of whom was but sixteen and the youngest but five years of age. The action is by the father against the railroad company for damages for the loss of his children. If there was no negligence on the part of the defendant, of course the plaintiff cannot recover. And even if there was great negligence on its part, yet if the accident was brought about in part by a want of ordinary care on the part of the deceased, a like result must follow.

The first inquiry, therefore, is: Is there any evidence going to show negligence on the part of the defendant?

The accident occurred in the afternoon of a lovely day in May. The children killed were returning home from a May-day picnic, in a light wagon drawn by one gentle horse. The eldest—a girl of sixteen—was driving. She was acquainted with the highway over which she was passing, and with the point at which it was crossed by the railroad track. Several persons in vehicles preceded her on the highway, and had crossed the railroad, the nearest one—Meeks—being some 400 feet in advance; and she was followed by a boy thirteen years old, at a considerable distance in the rear. On the railroad, about 335 feet from the point of crossing, was a covered bridge. On either side of the railroad, between the bridge and its intersection with the highway, were a number of eucalyptus trees, planted by the defendant, and which had attained such size as, according to some of the testimony in the case, prevented—in connection with some neighboring orchards—an approaching train from being seen by those traveling the highway, until the traveler should reach a point very close to the railroad track. There is also

evidence going to show that at the time of the accident the train was slightly behind time, and was running at the rate of from 33 to 35 miles per hour, whereas the rate at which the trains usually ran at that point was from 25 to 30 miles an hour. Further, there was some evidence tending to show that the bell was not rung nor the whistle blown. In the recent case of *Kellogg vs. N. Y. C. & Hudson R. R. Co.*, reported in 79 N. Y. 72, the only negligence on the part of the defendant submitted to the jury was its omission to ring the bell at the crossing, and the Court of Appeals held in that case that while there was a great preponderance of evidence that the bell was rung, the Court could not say that there was not some conflict in the evidence upon that question proper for submission to the jury. "There was some evidence," said the Court, "tending to show the bell was not rung, and we cannot say as matter of law that the jury was bound to disregard it."

In the case before us, the engineer and fireman of the locomotive were on the stand as witnesses, and neither of them was asked as to whether the bell was rung or the whistle blown. The engineer testified that when he first saw the children they were within about ten feet of the railroad track, and that the train was between the bridge and the crossing; that he at once put on the air-brake, but to stop the train was out of the question. The boy spoken of, who appears, from his testimony as reported in the record, to be a bright lad, testified that from the position he occupied on the highway he heard the rumble of the train as it passed through the covered bridge, but that he did not hear the bell nor the whistle; that he was in a position where he could have heard them, and that he was in the habit of hearing them at that point, having occasion frequently to pass there; while, on the other hand, the witness Meeks testified that from his position he heard both the bell and the whistle.

It was for the jury to pass upon the effect of this testimony. Besides, the increased speed, under the circumstances appearing, certainly tended to show negligence on the part of the defendant.

It was held in the case of the *Continental Improvement Company vs. Stead*, 5 Otto 163, that "where the view is obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides. Those in charge of the train should approach the crossing at a less rate of speed, and use increased diligence to give warning of its approach." And in the case of the *Louisville C. and L. Railroad Com-*

pany vs. Goetz, Administratrix, decided by the Court of Appeals of Kentucky, September 13, 1881, the crossing of a turnpike by the railroad train "on a descending grade, running thirty miles or more an hour, with no other signal or warning than a whistle within seventy yards of the crossing, to warn those traveling on the turnpike of its approach," was of itself held culpable negligence. (12 Reporter 618.)

Clearly, we would not be justified in holding that the testimony in the case now here was not such as entitled the plaintiff to have it submitted to the jury, or that, being so submitted, it is not sufficient to support the verdict of the jury finding negligence on the part of defendant.

Next, was there such contributory negligence on the part of deceased as precludes a recovery by the plaintiff?

On this branch of the case the law is: "If it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which Courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law to be decided by the Court. In all other cases the question must be submitted to the jury under proper instructions." (*Fernandez vs. Sac. City Railway*, 52 Cal. 52, and the numerous authorities there cited.)

This being the law, we are of opinion that the present case was properly submitted to the jury, and that there is no valid reason for disturbing their finding that there was no contributory negligence on the part of the deceased.

It has already been decided here that contributory negligence on the part of the injured party is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff. (*Robinson vs. W. P. R. R. Co.*, 48 Cal. 426, and authorities there cited.)

A part of the circumstances in the present case have already been detailed. It has been seen that the children were preceded a considerable distance on the highway by the witness Meeks. Some distance ahead of him was "Smalley's Stage," in which were a number of people. As Meeks approached the railroad track he noticed that the passengers in the stage were waving their hats and handkerchiefs at him, but he did not understand why. As he crossed the track he looked down it and saw the train at a distance, as he supposes, of from 1500 to 2000 feet beyond the bridge. Meeks, who was driving a good team, at a good gait, passed the railroad track, and, observing that the pas-

sengers in the stage continued to wave their hats and handkerchiefs, stopped and looked back to see if there was not some one behind him to whom they were waving, and saw the wagon, in which were the children, coming up the grade that leads up to the track at the crossing. Meeks further testified that when the children got close to the track they seemed to have discovered the train and to urge the horse on, and that the horse, as the train approached, swerved to the left, and a moment after he saw the horse in the air.

It will be borne in mind that the testimony went to show that because of intervening trees, those traveling along the highway in the direction the children were going could not see an approaching train until they had reached a point very near the railroad track. A part of the trees that thus obscured the view were planted and permitted to grow by the defendant along its track, and within its right of way. At the time of the accident, according to the testimony of Meeks, a wind was blowing, which caused the trees to rustle; and this, it may be, prevented the children—who were much nearer the railroad track, and consequently much nearer the trees, than were Meeks or the boy—from hearing the rumbling of the train, while both Meeks and the boy did hear it, according to their testimony. It is not to be presumed that the girl who was driving, recklessly or carelessly imperiled her own life and the lives of her younger brothers and sisters. And from the testimony of the engineer of the locomotive, as well as that of Meeks and the boy, it is quite certain that the children must have been dangerously near the track before they were made aware of the approach of the train. The engineer, according to his testimony, was in the cab and on the lookout. When he first saw them they were within about ten feet of the track; and as he saw the horse before he saw the children, it is not probable, if possible, that they could have seen the train until they reached a point dangerous in the extreme. The engineer further testified that the horse was on a trot when he first saw him, stopped when within about five feet of the track, turned his head to the driver's left, and then started on again, when the crash came. As the train was running at a rapid rate, and was between the bridge and the crossing when the horse was first discovered, of course all of this could have taken at most but a few seconds of time. It is by no means clear that the children could have escaped by the exercise of the utmost coolness and discretion. But in such cases, such a degree of care is never required of those traveling a highway. Certainly these children were not bound to exercise

more care than a prudent man approaching such a place would ordinarily exercise for his protection. (Authorities *supra*, and *Schierhold vs. N. B. and M. R. R. Co.*, 40 Cal. 447; *Richardson vs. N. Y. Central R. R.*, 45 N. Y. 846; *Ernst vs. Hudson R. R. Co.*, 35 N. Y. 9.) There is no proof that they were heedless, and under all the circumstances surrounding the accident, we think it was for the jury to determine whether they exercised that care which the law required of them.

There only remains to be considered whether the damages awarded the plaintiff by the jury—\$10,800—are excessive.

It is not claimed by the learned counsel for the appellant that this is so, unless the law be, as claimed by him, that the jury was limited to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of his children. Such is not the law in this State. (Code of Civil Procedure, Secs. 376 and 377; *Beeson vs. Green Mountain G. M. Co.*, 57 Cal. 37; *Cook vs. Clay-street Hill Co.*, 9 Pac. C. L. J. 605.)

In view of the rule of damages prevailing here, we cannot be reasonably expected to hold that for such a loss as the plaintiff in this case sustained, the amount awarded him by the jury was excessive.

Judgment affirmed.

We concur: McKinstry, J., Sharpstein, J., Morrison, C. J.

IN BANK.

[Filed December 27, 1882.]

Nos. 8406, 8407.

SWAMP LAND DISTRICT No. 121, APPELLANT,

VS.

HAGGIN, RESPONDENT.

SWAMP LAND—ASSESSMENT—COMPLAINT—JURISDICTION—POLITICAL CODE—ACT OF MARCH 28, 1868—CORPORATION. A swamp land district organized under the Act of 1868 cannot proceed to levy assessments and recover the same under the provisions of the Political Code.

1D.—PLEADING. The right to proceed under any particular Act is jurisdictional, and must be pleaded.

Appeal from Superior Court, Kern County.

Smith, and *Stetson & Houghton*, for appellant.

Louis T. Haggin, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action is brought to enforce liens for assessments upon tracts of land belonging to defendant within a Swamp Land District.

A demurrer to the complaint was sustained in the Court below, and, plaintiff having declined to amend, final judgment was entered in favor of defendant, from which judgment plaintiff has appealed.

It is contended by respondent that it appears in the complaint the district was created and organized under the Act of March 28, 1868, while the further averments show that the assessments were attempted to be made under the provisions of the Political Code.

Inasmuch as it is not alleged that plaintiff was reorganized under Section 3478 of the Political Code, the demurrer was properly sustained, if respondent correctly construes the complaint. (*Rec. Dist. No. 3 vs. Kennedy*, 58 Cal. 124.)

The averments of the complaint with reference to the creation and existence of plaintiff as a Reclamation District are as follows: "That, as plaintiff is informed and believes, plaintiff, Swamp Land District Number One Hundred and Twenty-one, is, and ever since the 22d day of December, 1870, has been, a municipal corporation, to wit: a Swamp Land District, or Reclamation District, created, organized and existing under and by virtue of the laws of the State of California, claiming in good faith to be a corporation, and a Swamp Land Reclamation District, and as such doing business and exercising corporate powers and the powers of a Swamp Land District under the laws of the State of California. That said district was established by an order of the Board of Supervisors of the county of Kern, in the State of California, which order, as plaintiff is informed and believes, was duly given and made," etc.

No force can be given to the allegation that plaintiff claimed "in good faith" to be a corporation. It is urged by appellant, however, that, if it was a corporation *de facto* when the assessment was levied, defendant can neither object that it had no legal existence nor that the assessment was not levied in accordance with the statute in force and applicable to the particular district. But the action is not brought to determine the right of the plaintiff to property owned by it in ordinary proprietorship, or to enforce a contract entered into with a third person. It is an attempt to enforce a burden imposed *in invitum* upon the property of another, and can be maintained only in case the authority to impose it was conferred by statute. (2 Dillon Mun.

Cor., 3d Ed., 763, 769.) If the mode of levying the assessment must be found in the statute, and if the mode differs in case the corporation was formed under one statute from that which may be pursued by a corporation formed under another statute, it would seem to follow that a complaint is insufficient unless it appears from it that the corporation was formed under the law which authorizes the levy of the assessment *in the manner* in which it is alleged to have been levied. The power is measured by the mode, since the statute under which the corporation exists limits the exercise of the power to the mode therein provided. The right to proceed under any particular Act is jurisdictional, and must be pleaded. (*Rec. Dist. vs. Kennedy, supra.*)

But here it appears affirmatively that the corporation was organized under the Act of 1868. It is said by appellant the averment that the Reclamation District was "established" by order of the Board of Supervisors is not the equivalent of an averment that plaintiff was *incorporated* by such order, and that the Board alone could not incorporate a district. Further, that the averment of corporate existence "ever since December, 1870," is immaterial; the only material allegations being that the district, existing as a corporation, levied an assessment. But this is a refinement which we cannot recognize as relieving the plaintiff of the natural purport of the words employed. There are manifest and apparently sufficient averments that the district was established by an order of the Board of Supervisors "duly given and made," and that the plaintiff has been a corporation since December 22, 1870. The district, therefore, was established by order of the Board of Supervisors; that is, the judgment of the Board, which, followed by other statutory steps, clothed the district with the powers of a corporation, was had and made prior to the adoption of the Political Code. The order was made while the Act of 1868 was in force; and prior to the adoption of the Political Code, there was no statute under which the Board of Supervisors could make such an order, *except* the Act of 1868. It would seem plain that the averments of the complaint, fairly construed, show the plaintiff to have acquired the rights of a corporation, as a Swamp Land District, under the Act of 1868.

The averments with respect to the mode of assessment are unmistakably averments of the Acts required by the Political Code. The complaint follows exactly the language of Section 3456 (*et seq.*) of that Code concerning the levying of assessments. It would extend this opinion unnecessarily to enter into details, but a comparison of the averments of the

complaint with the Act of 1868 and with the Political Code clearly shows that, wherever the requirements of the former differ from those of the latter, the Act of 1868 has been ignored.

It is urged by appellant that the district may claim to exist under the Act of March 27, 1874. (Stats. 1873-4, p. 721.) That Act *recognizes* the existence of the district, but does not in terms refer its origin to any particular Act of the Legislature. It does, however, in express terms require that Swamp Land District Number 116 (claimed by plaintiff to be the district now known as Number 121) shall have an extended time to complete its works of reclamation "in accordance with an Act to provide for the management and sale of the lands belonging to the State, approved March 28, 1868."

Judgment affirmed.

We concur: Ross, J., Sharpstein, J., Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed January 4, 1883.]

No. 8613.

TIBBETS, APPELLANT, vs. ROLFE ET AL., RESPONDENTS.

DEMURRER—COMPLAINT. In this case the Court below sustained a demurrer to the complaint. The demurrer was on the grounds, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, unintelligible and uncertain, specifying the particulars. *Held*, the demurrer might properly be sustained upon either of the grounds above referred to.

Appeal from Superior Court, Los Angeles County.

L. C. Tibbets, for appellant.

C. W. C. Rowell, for respondents.

By the COURT:

The complaint in this case was demurred to on several grounds, among others that it did not state facts sufficient to constitute a cause of action, and that it is ambiguous, unintelligible and uncertain, specifying in what particulars it was so. The Court sustained the demurrer, and the question whether the Court erred in doing so is the only one before us on this appeal. We think that the demurrer might properly be sustained upon either of the grounds above referred to.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed December 20, 1882.]

No. 7411.

THE MECHANICS' FOUNDRY OF SAN FRANCISCO,
APPELLANT,
VS.
RYALL, RESPONDENT.

INJUNCTION—EQUITY—TRESPASS. Reported trespasses are not of themselves sufficient to justify the interference of a Court of Equity by injunction. **Id.—Id.** There is no averment in the complaint that the defendant is insolvent, nor does it appear therefrom that the wrongs complained of are irreparable or destructive of the plaintiff's estate in its nature and substance, nor that they are not susceptible of adequate compensation in damages.

Appeal from Twelfth District Court, San Francisco.

R. Percy Wright, for appellant.

M. Eyre, Jr., for respondent.

Ross, J., delivered the opinion of the Court:

The complaint in this case does not state facts sufficient to warrant the interposition of a Court of Equity. It charges that the defendant "is a stockholder in said corporation (plaintiff), and was, up to July 23, 1879, an employee engaged in working in the foundry or shop of the plaintiff. That on said date, for good cause, defendant was dismissed from plaintiff's employ; that though thus discharged, he has ever since said date come daily to plaintiff's shop or foundry and insisted upon occupying his place as an employee of said plaintiff, and threatens to continue daily so to do. That there is a certain part of said foundry known as a bench and floor, whereon the said Ryall formerly worked, and upon which he still daily intrudes, and threatens to continue to occupy said space, and to prevent any one else from working therein. That while the said Ryall thus refuses to vacate said bench and floor it is impossible for said plaintiff to procure another workman to occupy and work in said department. That the work of said shop is thus retarded, and the plaintiff is prevented from fulfilling its contracts, and is obliged to refuse work, and to lose the profits thereof, and that if such conduct is not prevented the business of the corporation will be totally ruined. That in addition to the certainty of the said corporation's ultimate ruin by the con-

tinuation of said acts and conduct of this defendant, it has suffered damage, and will continue to be damaged by this defendant's acts and conduct, at the rate of \$50 per week, from the 23d of July, A. D. 1879."

It is only by inference that the complaint charges the defendant with the commission of a trespass. But even repeated trespasses are not of themselves sufficient to justify the interference of a Court of Equity by injunction. (*Jerome vs. Ross*, 7 Johns, Ch. 332; *Catching vs. Terrel*, 10 Georgia 576; *Thomas vs. James*, 32 Ala. 725; High on Injunctions, 2d Ed., Vol. 1, p. 476; Hilliard on Injunctions, 3d Ed. p. 345.) There is no averment in the complaint in this case that the defendant is insolvent, nor does it appear therefrom that the wrongs complained of are irreparable or destructive of the plaintiff's estate in its nature and substance, nor that they are not susceptible of adequate compensation in damages. And if we look at the findings made after trial, we see that up to the time of the issuance of the restraining order, "that by the conduct of defendant, plaintiff was damaged in at least the sum of \$10."

The case, in truth, seems at most to be one of ordinary trespass; annoying it may be, but one, nevertheless, for which the ordinary remedies of the law are ample.

Judgment reversed and cause remanded.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed December 2, 1882.]

No. 10,693.

EX PARTE JOHNSON.

MEDICAL EXAMINERS—CERTIFICATE—CONSTITUTION. Petitioner was charged with practicing medicine without having first procured a certificate so to do, as required by the Act of April 1, 1878. (Stats. 1877-8. p. 918.) Held, upon the authority of *Ex parte Fraser*, 54 Cal. 94, petitioner should be remanded.

Habeas corpus.

Rhodes, Travers, and Reynolds, for petitioner.

Taylor & Haight and Jarboe & Harrison, for respondent.

By the COURT:

Upon the authority of *Ex parte Fraser*, 54 Cal. 94, writ dismissed and petitioner remanded.

DEPARTMENT No. 1.

[Filed November 27, 1882.]

No. 8685.

KITTS, PETITIONER,

VS.

SUPERIOR COURT, RESPONDENT.

JUSTICES' COURT—SUPERIOR COURT—APPEAL—JURISDICTION—WRIT OF REVIEW—AMENDMENT. After judgment in a Justices' Court in favor of plaintiff in the action, defendant appealed to the Superior Court on questions of law and fact. The latter Court allowed plaintiff to amend his complaint, to review which proceeding defendant in the action, petitioner here, sought a writ of review. *Held*, the petitioner discloses no excess of jurisdiction on the part of the Superior Court.

Dibble & Kitts, for petitioner.

By the COURT:

The petition here discloses no excess of jurisdiction on the part of the Superior Court.

Writ denied.

DEPARTMENT No. 2.

[Filed December 18, 1882.]

No. 6429.

THE FARMERS' CO-OPERATIVE UNION, APPELLANT,

VS.

TRESHER, RESPONDENT.

PROHIBITION—TAX COLLECTOR. Application in Superior Court for a writ of prohibition against defendant, Tax Collector, to prohibit him from enforcing payment of a tax alleged to be void. *Held*, on appeal, the case is within the principle decided in *Cameron vs. Kenfield* (57 Cal. 550), in which it was held that the Legislature could not enlarge or extend the office of the writ of prohibition so as to include ministerial functions.

Appeal from Superior Court, San Joaquin County.

Pillsbury & Titus, and *Baldwin*, for appellant.

J. C. Campbell, for respondent.

By the COURT:

This case is within the principle decided in *Cameron vs. Kenfield*, 57 Cal. 550, in which it was held that the Legislature could not enlarge or extend the office of the writ of prohibition so as to include ministerial functions. We perceive no distinction, in this regard, in the provisions of the Constitution relating to the Supreme Court and the Superior Courts. The judgment and order appealed from are affirmed.

IN BANK.

[Filed December 15, 1882.]

No. 10,662.

PEOPLE, RESPONDENT, vs. HAMILTON, APPELLANT.

JURY—OPINION—ACTUAL BIAS—IMPLIED BIAS—PEREMPTORY CHALLENGE. A juror, after stating that he had an opinion as to the guilt or innocence of defendant, was asked by counsel for defendant, "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court sustained an objection to the question, and defendant excepted. The juror was afterward excused upon a challenge for cause. *Held*, defendant was deprived of no substantial right—conceding the ruling to have been erroneous—in so far as was concerned his privilege to challenge for bias, actual or implied. *Further*: If the question should have been allowed "to enable the defendant to intelligently exercise the right of peremptory challenge," no injury was done to defendant, who had no occasion to determine whether she should peremptorily challenge the person under examination, since such person "was excused upon a challenge for cause."

Id.—Id. Another juror stated that he had a *qualified* opinion as to the case. He was asked by defendant's counsel: "From the opinion you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" Objection was sustained and defendant excepted. *Held*: If the juror had been challenged for actual bias, the question might properly have been asked; the issue being in such cases, "the existence of a state of mind on the part of the juror * * * in reference to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party" (Pen. C., 1073); the fact that a jurymen had a qualified opinion, or even impression, of defendant's guilt might *tend* to show an existence of actual bias. But the juror was not challenged for actual bias, nor challenged at all. No issue was made to which his testimony was directed, and the action of the Court, in refusing to allow the question whether his qualified opinion was favorable or hostile to defendant, cannot be assigned as error.

Id.—Id. After a trial of an issue as to the existence of actual bias in the mind of the juror, and a finding against the challenging party, it would appear that he should be sufficiently informed to exercise his right of peremptory challenge. The law gives him the advantage of any knowledge he may thus acquire, but does not afford him an opportunity to examine a juror for the avowed object of determining whether he will challenge him peremptorily.

Id.—INSANITY—INSTRUCTIONS—BURDEN OF PROOF. The Court charged the jury following: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he (she) was insane. That the insanity must be *clearly established by satisfactory proof*." *Held*, not misleading.

Appeal from Superior Court, Sacramento County.

C. L. White, for appellant.

Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

In his petition for rehearing, counsel for defendant and appellant insists that two propositions, by him advanced, have been entirely misapprehended by this Court. The first of these relates to the ruling of the Court below in sustaining objections to questions asked by defendant at the impaneling of the jury; the second to an instruction given to the jury upon the subject of insanity.

I. Wilkinson was examined on oath as to his qualifications to sit upon the jury. After stating that he had an opinion as to the guilt or innocence of defendant, he was asked by counsel for defendant: "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court sustained the District Attorney's objection to the question, and defendant duly excepted. The bill of exceptions proceeds: "The juror was afterward excused upon a challenge for cause."

It is perfectly manifest that defendant was deprived of no substantial right—even conceding the ruling to have been erroneous—in so far as was concerned her privilege to challenge for bias, actual or implied.

Counsel for appellant argues, however, that the question should have been allowed "to enable the defendant to intelligently exercise the right of peremptory challenge." But if counsel be correct in this assertion, still no injury was done to defendant, who had no occasion to determine whether she should peremptorily challenge the person under examination, since such person "was excused upon a challenge for cause."

J. M. Henderson was examined as to his qualifications to serve on the jury. He stated that he had a *qualified* opinion as to the case. He was asked by counsel for defendant: "From the opinion you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" The District Attorney objected on the ground that the question was incompetent, irrelevant and improper. The Court sustained the objection, to which ruling defendant excepted.

If Henderson had been challenged for actual bias, we think—notwithstanding the fact that counsel for appellant disavows the proposition—the question might properly have been asked. The issue being in such case, "the existence

of a state of mind on the part of the juror * * * in reference to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party"—(Penal Code, 1073)—the fact that a jurymen had a qualified opinion, or even impression of defendant's guilt might *tend* to show an existence of actual bias. And this is true, although it is also true that actual bias does not exist, provided the juror, notwithstanding his qualified or unqualified opinion, can and will "act impartially and fairly."

It has been supposed that *People vs. Williams* (6 Cal. 206) lays down a different doctrine. In that case the question did not arise. There the juror was asked if he had formed or expressed an unqualified opinion "as to the guilt or innocence of the accused," and answered that he had formed an unqualified opinion, or an opinion "not qualified." There seems to have been no further examination, yet upon this evidence the District Court held the juror competent and qualified. The Supreme Court decided that the Court below should, upon the uncontradicted testimony, have sustained a challenge for implied bias. The only argument adduced in support of the ruling of the lower Court was that it did not appear from the record that the unqualified opinion was adverse to defendant, although it did appear that the person examined had expressed an unqualified opinion as to the guilt or innocence of the accused.

What is said in *People vs. Williams* with reference to the impropriety of permitting the inquiry on which side an opinion has been expressed, was not called for in the case. But treating the case as correctly deciding that, upon the issue of "implied bias," which, as the law then stood, was established by showing that a jurymen "had formed or expressed an unqualified opinion," etc., it was immaterial to know, and therefore (in view of the possible effect upon other persons summoned as jurors and awaiting examination) improper to inquire, whether the "unqualified opinion" was for or against the prisoner; such an issue can no longer be raised, since "the having formed or expressed an unqualified opinion as to the guilt or innocence of the accused" is no longer a cause of challenge for implied bias. (Penal Code, 1074, as amended April 9, 1880.)

The reason suggested in *People vs. Williams* never applied to a question put upon the trial of an issue of actual bias, and the importance of ascertaining the exact condition of the juror's mind requires the freest latitude in an investigation, the end of which is to ascertain, "Is the juror impartial?"

But the juror Henderson was not challenged for actual bias, nor challenged at all. Here, again, it would seem, certain early cases in California have been somewhat misunderstood. In the case of *The People vs. Backus* (5 Cal. 277), Murray, C. J., said: "There is another objection raised by the appellant, which, *if not sufficiently erroneous to reverse the judgment*, at least calls for correction at the hands of this Court. I refer to the course adopted by the Court below in refusing to allow the prisoner to propound any interrogations to the jurors without *first* challenging them for cause. It is usual everywhere to ask the juror if he has formed or expressed an opinion as to the guilt or innocence of the accused, but in the present case the Court refused to allow these questions to be asked, and the prisoner was compelled to prejudice his case by first challenging the jurors and then having the fact of their bias determined by triers appointed by the Court. Before being thus compelled to challenge he should have been allowed to ascertain whether there was any fact from which the presumption of bias or prejudice would arise, and, this fact having been ascertained, then the challenge would properly have followed, and the triers would have had to ascertain whether there was bias in fact."

Read as a whole, the language quoted is not to be construed as holding that a defendant need not interpose a challenge, as for implied or actual bias, until he has proved that it ought to be *allowed*, or that he can complain of any ruling with reference to a question he may ask, without challenging the juror, but only that it is the better practice to permit preliminary inquiries, which, if answered satisfactorily to defendant, may relieve him of the necessity of challenging. But if it be admitted to be the rule that the examination may be exhaustive before the challenge, the examination, or any ruling during its continuance, cannot be made the foundation for alleged error, unless the challenge is taken at *some stage* of the proceedings in the Court below. In *People vs. Reynolds* (16 Cal. 129) the Court—by Baldwin, J.—said: "It is the common practice in this State to interrogate a juror upon his *voir dire* generally as to his qualifications, with a view to obtain information upon which to rest a specific challenge. The practice, though productive of some inconvenience, is one of necessity; for unless it be followed, it will often be quite impossible to ascertain the qualifications of the juror. * * * If, therefore, the challenge for implied bias be not taken before the juror is examined, the proper course to pursue is to make the challenge, stating dis-

tinently its causes, *immediately after the preliminary examination is closed*. The District Attorney can then except to the challenge, or deny the facts it alleges. If the latter course be adopted, the juror can be further examined, and other witnesses called, and the matter be thus submitted to the Court." Of course, under the Penal Code the same rule applies to the matter of actual bias.

In the present case the transcript shows that *Henderson* was not challenged before or after his examination upon his *voir dire*, either for actual or implied bias. His examination therefore went for naught. No issue was made to which his testimony was directed, and of course the action of the Court, refusing to allow the question whether his qualified opinion was favorable or hostile to defendant, cannot be assigned as error.

After a trial of an issue as to the existence of actual bias in the mind of the juror, and a finding against the challenging party, it would appear that he should be sufficiently informed to exercise his right of peremptory challenge. The law gives him the advantage of any knowledge he may thus acquire, but does not afford him an opportunity to examine a juror for the avowed object of determining whether he will challenge him peremptorily.

Mr. Justice Crocker—in *Watson vs. Whitney*, 23 Cal. 379—remarked: "Each party has a right to put questions to a juror to show, not only that there exists proper grounds of a challenge for cause, but to elicit facts to enable the party to decide whether or not he will make a peremptory challenge." But this language was clearly *dictum*, since one of the questions asked was evidently directed to an ascertainment of the fact whether or not the juror had formed or expressed an *opinion*, and the having formed or expressed an unqualified opinion was (under the law then in force) cause of challenge for implied bias.

In *People vs. Car Soy* (6 Pac. C. L. J. 880), two of the Justices in Department Two cited the language of Mr. Justice Crocker, above quoted, with apparent approval. But an examination of that case will show that the questions there objected to were such as, if answered in the affirmative, would lead to facts tending to prove that the juror was *actually biased*.

It has never been declared, in any case where such declaration was necessary to the decision, that a person summoned as a juror may be questioned for the mere purpose of ascertaining whether the questioner shall determine to challenge him peremptorily.

The Penal Code, after enumerating a large number of facts, the mere existence of which shall conclusively establish bias on the part of an individual juror, gives to the parties to a criminal action an opportunity to enter into an enlarged inquiry as to the state of mind of the juror; whether, with or without reason, he is not strictly impartial. With reference to the existence of any one of the facts, which, by law, conclusively establishes implied bias, and with reference to the existence of a state of mind in the juror rendering him not strictly impartial, an issue must be made up before or after a preliminary examination. After giving the opportunity thus to ascertain the existence or non-existence of implied or actual bias, the Penal Code accords to a defendant on trial for an offense punishable with death twenty *peremptory* challenges. These he exercises at his own option. The State cannot say he ought not to challenge peremptorily a particular juror. No issue is based upon the result of the trial of which his right depends. As no issue can be made or tried, to which the question, intended simply to enable a defendant to make up his mind whether he will challenge peremptorily, can apply, it would follow, if appellant is right, that the trial Court can place no limit upon the questions which defendant may choose to ask.

While, therefore, a defendant may, when the opportunity to interpose a peremptory challenge arises, have the benefit of any information acquired during the trial of a challenge for implied or actual bias, he cannot embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged.

II. It is said that the Court below erred in charging the jury as follows: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and that the proof must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he was insane. That the insanity must be clearly established by satisfactory proof."

In answer to questions propounded by the House of Lords (Roscoe's Cr. Ev. 953), Tindal, C. J., said: "To establish a defense on the ground of insanity it must be *clearly proved* that at the time of committing the act the party accused was laboring under such a defect of reason," etc. In *People vs. McDonnell* (47 Cal. 136), an instruction given in the Court below was approved, and was thus construed: "In other words, insanity must be clearly established by satisfactory proof."

Appellant relied upon *People vs. Wreden*, (8 Pac. C. L. J. 191.) We do not find it necessary to dissent from the philological criticism found in the opinion of two of the Justices in that case. The judgment of the trial Court was there properly reversed, if for no other reason, because instructions were clearly contradictory. In the same charge the jury were told "if they entertained a reasonable doubt of the sanity of the defendant he must be acquitted," and "it was not sufficient [to justify an acquittal] that they should merely entertain a reasonable doubt of his sanity."

The first question to be solved in every review of an instruction is, of course, what idea was conveyed by it to the jurymen? In the case before us the jurors were told, in effect, that the burden of proving insanity is on the defendant; that he is not obliged to prove his insanity beyond a reasonable doubt, but, on the other hand, it is not sufficient to create a reasonable doubt that the defendant is or may be insane; that it is enough if the evidence be such as would justify a jury in a civil case in finding defendant insane were the single issue "sane or insane" submitted to them—that is, it is enough if the insanity be established by a preponderance of evidence. We are convinced the phrase used in connection with the last proposition—"the insanity must be clearly established by satisfactory proof"—could not have misled the jury. The words were added, it would appear, in opposition to any suggestion that defendant would be entitled to the benefit of a reasonable doubt on the question of insanity, and to guard the jury from the effect of such suggestion. Reading the charge as a whole—so far as it treats of insanity—the jury were informed that insanity was established satisfactorily if it was proved by a clear preponderance of the evidence.

Having been told that the evidence in favor of insanity must outweigh the evidence in favor of sanity, the jury were further instructed that this must clearly appear; that they must not mistake a *quantum* of evidence which creates a doubt of defendant's sanity for that which overcomes the presumption of sanity, and the proof of such facts as may be established affirmatively for the purpose of strengthening the presumption. In the connection in which the words are used, to say that insanity must be "clearly established" is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmative of an issue is sought to be established and a peculiar presumption to be overcome. There may be a greater or less

degree of lucidity, but the preponderance must be distinctly perceptible. It is in this sense that the expression is often used by Courts and law writers in speaking of the degree of evidence necessary to overcome a presumption greater than that which arises, that a particular fact—as probably existing as non-existing—exists—*e. g.*, as when it is said that fraud must be clearly proved. In civil cases fraud is proved. In civil cases fraud is proved by a preponderance of the evidence, yet, inasmuch as the law, to the credit of human nature, presumes that men are oftener honest than dishonest, the preponderance must clearly appear. Thus only can the fact of fraud or insanity be “satisfactorily proved.”

Judgment and order affirmed.

We concur: Ross, J., Myrick, J., Morrison, C. J., McKee, J.

I dissent: Sharpstein, J.

DEPARTMENT No. 2.

[Filed January 5, 1883.]

No. 8672.

DENNIS ET AL., APPELLANTS,
 VS.
 WINTER, RESPONDENT.

ADMINISTRATOR'S SALE—PROBATE COURT—PETITION—RECITALS—ORDER—
 COLLATERAL ATTACK—VERIFICATION—RETURN. Ejectment by heirs of
 a decedent against the purchaser of the premises from the adminis-
 trator under an order of sale made by the Probate Court after petition
 filed. *Held*, the facts stated in the petition, aided by the recitals in
 the order of sale, were sufficient, on this collateral attack, under Sec-
 tion 1537 C. C. P., to give the Court jurisdiction to make the order.

Id.—Id. On a collateral attack it is sufficient if the order confirming the
 sale recites that the return of the sale was duly verified by affidavit.

Id.—Id. Upon a collateral attack, mere irregularities in the proceedings do
 not affect the title acquired by a purchaser at an administrator's sale.

Appeal from Superior Court, Yolo County.

Harding and Clark, for appellants.

Freeman & Bates, Sprague and Garoutte, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

It appears from the evidence in this case that the land
 sued for was owned by one B. S. Dennis, under whom plain-
 tiffs claim title as heirs, and that it was sold under an order
 of the Probate Court, the defendant becoming the purchaser.
 The questions in the case involve the regularity and validity
 of the proceedings in the Probate Court, culminating in a

sale and the execution of a deed to the purchaser by the administrator of the estate of B. S. Dennis, deceased. The defendant had judgment in the Court below.

It will not be necessary, and it is not our intention to examine all the questions presented on the appeal, but we will content ourselves with an examination of such points as we consider determinative of the case.

The first point made relates to the sufficiency of the petition upon which the order of sale was made. It is important to bear in mind that this is not an appeal from a judgment or order of the Probate Court, made in the course of administration, but it is a collateral attack upon the proceedings had in that Court. If, therefore, the Court (which was in that proceeding one of general jurisdiction) had *jurisdiction* to make the orders attacked and to take the proceedings resulting in the sale of the land, its judgment and orders must be treated, for the purposes of the present case, as conclusive of the matters determined by them.

Does the record show facts sufficient to give the Court jurisdiction? We think it does. Section 1537 of the Code of Civil Procedure designates the facts which such a petition must contain, and an examination of the petition, the sufficiency of which we are now considering, will show that it (aided as it is by the order of sale), substantially complies with the requirements of the Code. If the petition does not set forth all the facts showing the sale to be necessary and giving the Court jurisdiction, such failure will not invalidate the subsequent proceedings "if the defect be supplied by the proofs of the hearing, and the general facts showing such necessity be stated in the decree." (Sec. 1537 C. C. P.) The order of sale contained a full recital of the facts, showing that the case was a proper one for the sale of the real estate of the deceased.

The next point is, that the return of sale was not verified, as required by Section 1517 of the Code of Civil Procedure. That section declares that "no sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be, under oath, reported to and confirmed by the Court before the title to the property sold passes."

It is not necessary for us to determine whether a failure to make a return of the sale under oath would affect the validity of the title in a *collateral* attack upon the judgment, because we have in this case a recital in the order confirming the sale that *the return of the sale was duly verified by affidavit*. This recital is conclusive in the present case, and a finding

of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact was not a jurisdictional one, and the principle applicable to the inconclusiveness of statements or recitals in judgments *conferring jurisdiction* does not apply. (*McKinley vs. Tuttle*, 42 Cal. 570.)

What we have already said disposes of the objections to the order and notice of sale. The matters complained of were mere irregularities at the most, and do not affect the title acquired by the defendant. In this collateral attack such objections cannot prevail.

Judgment and order affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 2.

[Filed December 14, 1882.]

No. 8412.

DEAN, PETITIONER,

VS.

SUPERIOR COURT OF SANTA BARBARA COUNTY,
RESPONDENT.

ESTATE OF DECEASED PERSON—DISTRIBUTION—NOTICE—DECREE—FINAL SETTLEMENT—ACCOUNT—PETITION. When notice is given that a *final account* has been filed, and of the day fixed for its settlement, notice is given that it is filed for final settlement; and when notice is given that with such final account there is filed a petition for distribution, notice is given that it is for a *final* distribution.

ID.—APPEAL—REVIEW—ORDER. An order of the Superior Court declaring a decree of settlement of final account, distribution and discharge to be void, and in setting the decree aside, is not appealable, and the writ of review is the appropriate remedy.

Canfield, for petitioner.

Stratton, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is a proceeding by writ of review, to review the action of the Superior Court in declaring a decree of settlement of account, distribution and discharge to be void, and in setting the decree aside.

The Superior Court, after hearing the evidence, found that the executor rendered a final account for settlement, and at the same time filed a petition for the distribution of the estate; that the final account was for a final settlement, and the petition for distribution was for a final distribution of

the estate; that the record shows that the notice of the settlement of the account did not state that the account was for a final settlement or that the petition was for a final distribution; and, as conclusion of law, the Court found the decree void. The findings contain nothing as to the facts not appearing in the record, upon which it was claimed that the decree should have been set aside; and although the Court subsequently heard evidence upon such alleged facts, and in the recitals of the decree stated that the matters alleged in the petition were true, yet it does not appear that in the settlement of the account the Court was imposed upon by false testimony; the Court, in the proceedings subsequent to the finding that the decree was void, seems to have heard the case and determined it upon the idea that there was no decree of settlement, distribution or discharge.

The notice for settlement and distribution referred to in the findings reads: "Notice is hereby given that E. W. Dean, executor of the estate of Horace W. Dean, deceased, having filed in this Court his final account and petition for distribution," etc., naming the time and place of hearing. The section under which the proceedings were had, Section 1694 C. C. P., reads: If the account rendered for settlement "be for a final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts," etc. The objection to the notice, and hence to the decree based thereon, seems to be that the notice did not state that the account was rendered *for a final settlement*, and that the petition filed was for a *final* distribution. We think the objection is too critical. The notice did state that a final account had been filed, and that there was a petition for distribution. We think that in the orderly proceedings for the settlement of an estate, when notice is given that a *final account* has been filed, and of the day fixed for its settlement, notice is given that it is filed for final settlement, and no one would be misled; and when notice is given that with such final account there is filed a petition for distribution, notice is given that it is for a *final* distribution.

We think the Court erred in its conclusions of law as to the validity of the decree; therefore the order adjudging it to be void is annulled. We express no opinion as to any other branch of the case, except to say that the order complained of is not an appealable order (Sec. 963 C. C. P., Subdivision 3), and the writ of review is the appropriate remedy.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed December 12, 1882.]

No. 7140.

THE REMINGTON SEWING MACHINE COMPANY,
RESPONDENT,
VS.
COLE ET AL., APPELLANTS.

CHANGE OF VENUE—DISMISSAL OF ACTION—PARTIES.—Action commenced in county of San Francisco. Joseph H. and George N. Cole were united as defendants with Jewell and Showers. The complaint alleged that Showers, Jewell and George N. Cole formed a copartnership; that plaintiff entered into an agreement with said partnership, etc.; that as a condition precedent to said agreement, plaintiff exacted from each and every member of the firm a bond in the sum of \$10,000, conditioned that if said Showers, Jewell & Cole should, from time to time, as the same should become due, pay all dues, etc., which under their agreement might become due to plaintiff, or in default thereof, that said member would pay to plaintiff his one-third part of any such indebtedness, then the obligation to be void; otherwise, etc. George N. Cole, as one of the firm of Showers, Jewell & Cole, executed such a bond to plaintiff, with Joseph H. Cole as surety. After dissolution of partnership and settlement of affairs, the firm was indebted to plaintiff in the sum of \$9,701 55, of which the complaint alleged Joseph H. Cole became liable to pay \$3,233 85; that since said settlement Showers and Jewell paid plaintiff \$6,208 34, leaving unpaid \$3,193 21. Prayer therefor against the four defendants. Showers and Jewell demurred. The Coles also demurred, and moved a change of venue, which was denied August 30, 1878. Afterward the Coles' demurrers were overruled and the action was dismissed as to Showers and Jewell. Subsequently the Coles made a second motion for change of venue, which was denied, and this appeal is by the Coles from the order denying their second motion for change of venue. Both motions were made upon the ground that defendants Cole were residents of San Joaquin County. *Held*: If the complaint counted alone on the bond executed by Joseph H. and George N. Cole, there was no cause of action stated against Jewell or Showers, and they were improperly made parties. In that view, the Coles were entitled to a change of the place of trial, and their motion in that behalf made in 1877 and denied August 30, 1878, ought to have been granted, notwithstanding Jewell and Showers then remained parties of record. From the order made refusing a change of venue the parties aggrieved were entitled to appeal, and that was their remedy. If, on the other hand, the complaint contained a cause of action against Jewell and Showers, the order made August 30, 1878, was rightly made, for they did not join in the motion for a change of the place of trial, but, on the contrary, filed a demurrer, without objection on that ground. If there was a cause of action stated against them, they had as much right to have it tried in the city and county of San Francisco, where the action was commenced, as their co-defendants had to have it tried in the county of their residence. In either event the subsequent dismissal of the action as against Jewell and Showers could not operate to confer on the other defendants the right contended for by them. That right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action.

Appeal from Superior Court, San Francisco.

J. H. Budd, for appellants.

E. S. Pillsbury, for respondent.

Ross, J., delivered the opinion of the Court:

If the complaint counted alone on the bond executed by Joseph H. and George N. Cole, there was no cause of action stated against Jewell or Showers, and they were improperly made parties. In that view, the Coles were entitled to a change of the place of trial, and their motion in that behalf made in 1877, and denied August 30, 1878, ought to have been granted, notwithstanding Jewell and Showers then remained parties of record. From the order made refusing a change of venue the parties aggrieved were entitled to appeal, and that was their remedy. If, on the other hand, the complaint contained a cause of action against Jewell and Showers, the order made August 30, 1878, was rightly made, for they did not join in the motion for a change of the place of trial, but, on the contrary, filed a demurrer, without objection on that ground. If there was a cause of action stated against them, they had as much right to have it tried in the city and county of San Francisco, where the action was commenced, as their co-defendants had to have it tried in the county of their residence. In either event, we do not perceive how the subsequent dismissal of the action as against Jewell and Showers could operate to confer on the other defendants the right contended for by them. That right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action.

Order affirmed.

We concur: McKinstry, J., McKee, J., Morrison, C. J. ;

DISSENTING OPINION.

I dissent. This is one of the actions which the Code declares "must be tried in the county in which the defendants or some of them reside at the commencement of the action." (C. C. P. 395.) Before the action was dismissed as to any of the defendants some of them resided in San Francisco and some of them in San Joaquin County. After the dismissal of the action as to some of them the remaining ones resided in San Joaquin. They had a right to have the action tried in that county, and if they did not waive that right, the Court erred in denying their application to have the place of trial changed from San Francisco to San Joaquin. The right might have been waived by appearing and answering, or demurring without filing an affidavit of merits, and demanding "in writing that the trial be had in the proper county." (*Id.* 396.)

The appellants, on their first appearance, as the *sole* defendants in the action, and at the time of filing their answer, did file an affidavit of merits and a demand "in writing that

the trial be had in the proper county." Before that either San Francisco or San Joaquin was the *proper* county. Now, it could never have been the intention of the Legislature that a plaintiff, by improperly joining persons who resided in the same county with himself, against whom his complaint showed that he had no cause of action, with persons residing in another county against whom he did allege a cause of action as defendants, could defeat the right of the *real* defendants to have the action tried in the proper county, particularly when, as in this case, the action is dismissed as to the defendant's residing in the same county with himself before the filing of the answer. Whenever the intention of the Legislature is manifest it must prevail in the construction of statutes. The object of the Legislature was to prevent the trial of actions in counties other than those in which the defendants resided, unless they waived that right. I do not think that the Courts should sanction a palpable evasion of such a statute.

SHARPSTEIN, J.

I concur: Myrick, J.

New Law Publications.

AMERICAN AND ENGLISH R. R. CASES. Vol. VII, Part 3, and Vol. VIII, Part 1. Edward Thompson, Northport, Long Island.

SUTHERLAND ON DAMAGES. Vol. II. Callaghan & Company, Chicago.

We have already spoken of this work. Volume II sustains the reputation obtained by Volume I. In this second book the author treats of (1) Bonds and Penal Obligations; (2) Vendor and Vendee; (3) Notes and Bills; (4) Contracts for Services; (5) Contracts for Particular Works; and (6) Suretyship. Under the head of Probate Bonds the citation relied on in actions against sureties is *Irwin vs. Backus*, 25 Cal. 214. In the event of a second edition, we suggest the latest California decision on this question, *Chaquette vs. Ortel*, Pac. C. L. J.

We are surprised that there is no reference to bonds given on arrest. There is often much difficulty in ascertaining damages in actions against sureties on undertakings given in civil arrests. The work is, however, a very valuable one, thorough and accurate.

Pacific Coast Law Journal.

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No. 22.

Current Topics.

MARRIAGE A STATUS.

The Supreme Court of the United States, in *Cheever vs. Wilson*, 9 Wall. 108, say that marriage is a *status*, exclusively controlled by the laws of the State where the relation exists.

It has been called a contract, because entered into by the agreement of competent parties. In its foundation it is, like all contracts, governed by the *lex loci contractus*. (*Van Voorhis vs. Brinnall*, 86 N. Y. 18.) But when executed, it loses the characteristics of a contract, and becomes a status, several as to the husband and wife, he having his status as a married man, and she having hers as a married woman. (*People vs. Baker*, 76 N. Y. 78.)

Chief-Justice Shaw (*Smith vs. Smith*, 13 Gray, 210), thus speaks of marriage:

“Marriage is undoubtedly a contract, but it is a contract sanctioned by law, controlled by considerations of public policy vital to the order and harmony of social life, and in its nature indissoluble, except by violations of duty on the one part, to be taken advantage of in a special manner, provided by law, on the other. Neither party can do any act by way of release, grant, stipulation or agreement, to dissolve such contract; and yet by any of these acts one could estop himself in a matter of private right.”

Especially eloquent is the following, from the pen of Justice Cassoday, of the Supreme Court of Wisconsin (*Cook vs. Cook*, 14 N. W. Rép. 36): “Marriage is not only a contract, but, when consummated, creates the most peculiar and solemn of all domestic relations. It comes into existence in pursuance of a contract, but when formed it involves rights and duties flowing from a source transcendently above any and all contracts which the parties are capable of making. It is akin to the tender relation between parent and child, and has a peculiar sanctity, not to be expressed in any commercial phraseology like the word

'contract.' Its obligations can be enforced and its violations redressed in ways unknown to the law of contracts. It is shielded from unholy intrusion by severe penalties, enacted in laws both human and divine. It unites two persons for life by giving to each a new *status* before the law, as to society, each other, and the property of each. The *status* not only involves the well-being of the parties thus united, but the good of society and the State. It is, therefore, a proper subject for legislation. It may, from public considerations, be fixed, regulated and controlled by law."

VALIDITY OF DIVORCES, UPON CONSTRUCTIVE
PROCESS, OF ONE STATE AGAINST A RESI-
DENT OF ANOTHER STATE.

In the *Albany Law Journal* for December 2d Lucien B. Chase has written a very forcible article to show that a foreign divorce against a resident of New York (on constructive process) is valid, and changes the *status* of the New York party. The argument is very clever, but not as convincing as the decision of the New York Court of Appeals in *People vs. Baker*, 76 N. Y. 85. The facts of that case were these: The wife of a resident of New York obtained in Ohio (the place of her residence) a divorce from him on service of process by publication, and he subsequently remarried in New York. He was indicted for bigamy and convicted. Justice Folger based the decision upon the ground that, as the Ohio judgment was rendered by a Court that had no jurisdiction over the defendant, it was a judgment *in rem* only, and not *in personam*; *in rem* as respecting the *res* in dispute, viz., the *status* of the plaintiff seeking the divorce, and over whom it had jurisdiction, and not *in personam* as affecting the *status* of the defendant, over whom it had no jurisdiction. A State may adjudge the *status* of its citizens toward a non-resident, but it cannot push the effects of its judgments "over the borders of another State," and "fix upon a citizen of that State a *status* against his will." To the same effect was *Doughty vs. Doughty*, 28 N. J. Eq. 581, and *Stilphen vs. Stilphen*, 58 Me. 508.

In *Cook vs. Cook*, 14 N. W. Rep. 3, the Supreme Court of Wisconsin reviews this question *in extenso*. The husband obtained a divorce in Michigan on the ground of desertion. Subsequently

the wife applied for a divorce in Wisconsin, alleging desertion, and that the Michigan divorce was obtained without any notice to her, and asking alimony out of property in Wisconsin. The Court granted the divorce upon the ground that the Michigan divorce affected the *status* of the husband only.

The result of this doctrine is peculiar. According to the New York Court, a man can be convicted for bigamy while his wife is the lawful bed-mate of another man. According to the Wisconsin Court (24 Wis. 372), a husband who would be convicted of bigamy for remarrying will fail if he prosecutes another man for criminal intercourse with his wife. Neither practically nor theoretically can a wife live without a husband, or a husband without a wife—the effort is often made, but not with great success. There is no need for such a doctrine. The only object of a second suit is the settlement of property. This can be done by a Court of equity, basing its jurisdiction upon the possession of the property, and upon the general power of Courts of equity to allow alimony, even after the judgment in the divorce suit. In some States a Court of equity can grant alimony, though there has been no suit for divorce (38 Cal. 265). In States where a judgment of divorce is a prerequisite to an order granting alimony, the Court can base its order upon the *fact* of the divorce, no matter where obtained. If the man is divorced from the woman, she is sufficiently divorced from him to enable a Court of equity to grant her alimony, *provided* there is property within its reach (he being a non-resident). (Opinion of Taylor, J., in *Cook vs. Cook*, 14 N. W. Rep. 443, and *Galland vs. Galland*, 38 Cal. 265.)

GOLDEN WORDS.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. (Justice Miller, in *U. S. vs. Lee*, Alb. L. J.)

Supreme Court of California.

IN BANK.

[Filed December 12, 1882.]

No. 10,712.

PEOPLE, RESPONDENT, VS. WESTLAKE, APPELLANT.

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—THREATS. The Court below instructed the jury: "Past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will then be executed.

"The danger must be present, apparent and imminent, and the killing must be done under a well-founded belief that it was absolutely necessary for the defendant to kill the deceased at that time to save himself from great bodily harm."

Held, previous insults or conduct, however violent and abusive, are not, in and of themselves, sufficient to justify or excuse the commission of a crime. They are, however, evidential circumstances which, in connection with the facts and circumstances in which a crime has been committed, are entitled to due consideration in determining whether the person charged with the commission of the crime was justifiable or not. Substantially, that was the import of the first part of the above instruction, and was expressed in such language that the jury could not have misunderstood it. *Further*, the instruction as an entirety is not within Flahave's case (58 Cal. 249).

Id.—Id. The further instruction, "If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then to render said killing justifiable it must appear that the defendant was wholly without fault imputable to him by law in bringing about or commencing the difficulty in which the mortal wound was given," was also properly given in this case.

Id.—Id. A person accused of crime may show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But that is not the present case.

Id.—Id. It is allowable for a Court to give a hypothetical instruction, provided the province of the jury be not invaded.

Id.—TESTIMONY—OBJECTION—RULING—WAIVER. Where testimony is objected to, the Court reserving its ruling, and no ruling is had, and no request for a ruling or motion to strike out is made, the presumption is that the ruling was waived. *Further*, defendant did not make the omission of the Court to rule upon his objection or motion to strike out part of the grounds of his motion for a new trial.

Id.—EVIDENCE—EXPERT—WOUND—FACT. Whether the wound of which deceased died could have been inflicted by a shot fired by defendant from a certain direction, was a fact to be found by the jury from the evidence of the circumstances in which the homicide was committed, or to be inferred from the relative position of the parties at the time the shot was fired; it was not such a matter of science or skill as required the opinion of an expert. (*People vs. Smith*, 4 Pac. C. L. J. 213.)

Id.—DECLARATIONS—RES GESTÆ. Declarations by deceased made half an hour after he had been shot, relating to what he then meant to do to defendant for shooting him, are not part of the *res gestæ*.

Id.—WITNESSES—ERROR. The exclusion of the testimony of one witness as to a fact which has been proved by the uncontradicted evidence of another witness is not a prejudicial error; the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. (C. O. P., 1844.)

Appeal from Superior Court, Shasta County.

Chipman & Garter and Sweeney, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

In the Superior Court of Shasta County Thomas L. Westlake was charged, by criminal information, with having committed the crime of murder, by maliciously and unlawfully killing one John McCool, in that county. Upon trial a verdict was rendered against him of murder in the second degree, and on this appeal, which is from the judgment of conviction and from an order denying his motion for a new trial, it is insisted that the Court erred—

First, in giving to the jury the following instruction upon the subject of justifiable homicide:

“Past threats or conduct of the deceased, how violent soever, will not excuse a homicide, without *sufficient present demonstration to authorize the belief that the deadly purpose then exists*, and the fear that it will then be executed.

“The danger must be *present*, apparent and *imminent*, and the killing must be done under a *well-founded* belief that it was *absolutely necessary* for the defendant to kill the deceased at that time to save himself from great bodily harm.”

The first part of this instruction is challenged as erroneous; but as a proposition in criminal law, it is true that previous insults or conduct, however violent and abusive, are not, in and of themselves, sufficient to justify or excuse any one for the commission of a crime. (*People vs. Iams*, 57 Cal. 127.) They are, however, evidential circumstances which, in connection with the facts and circumstances in which a crime has been committed, are entitled to due consideration in determining whether the person charged with the commission of the crime was justifiable or not. Substantially that was the import of the first part of the instruction, and it was expressed in such language that the jury could not have misunderstood it.

But it is claimed that the instruction as an entirety is objectionable under the decision by this Court in *Flahave's* case (58 Cal. 249).

The instructions in the two cases are not identical. In the Flahave case the disapproved instruction was substantially this: To justify a person for killing another upon the ground of self-defense, the killing must be done under an appearance of danger so urgent and pressing that it was absolutely necessary to save his own life or to prevent great bodily injury. In this case the instruction was qualified by the expression that the killing must be done *under a well-founded belief that it was absolutely necessary*, etc. That qualification saves the instruction from the rule of the Flahave case, and, as qualified, the instruction in this case, as an entirety, was right. It is substantially the instruction which was given in the case of *The State vs. Rippey* (2 Head 217), which the Supreme Court of Tennessee approved as sound law.

Justification for a homicide, according to the Penal Code, must rest upon two things: (1) A reasonable cause; (2) An actual apprehension of a design to commit a felony or to do some great bodily injury. Both must exist or neither will avail. To constitute the defense the apprehension of danger must be founded on sufficient circumstances, real or apparent, to authorize the opinion that the felonious design *then exists*; previous threats or menacing conduct constitute part of such circumstances. And the circumstances must not only be such as authorize the fear of death or great bodily harm, but the fear caused by them must be actual—really entertained, and the homicidal act must have been done under the controlling influence of that fear, or, in other words, under the honest and well-founded belief that it was absolutely necessary to kill at that moment to save from the imminent danger that menaced life or limb. Can such a belief arise out of the circumstances of necessity or danger which a party has, intentionally or by his own fault, brought upon himself? We think not. Hence we see no error in the following instruction upon the same subject of justification, to which the defendant took exceptions:

“If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then to render said killing justifiable it must appear that the defendant was wholly without fault imputable to him by law in bringing about or commencing the difficulty in which the mortal wound was given.”

The instruction is taken literally from the decision of the late Supreme Court in *People vs. Lamb* (17 Cal. 323), which has been since followed and approved by this Court in *People vs. Travis* (56 *id.* 254). It is true that in *People vs.*

Simons (8 Pac. C. L. J. 1127), the doctrine enunciated in those cases seems to have been questioned; but it was not questioned by a majority of the Judges who concurred in that decision; and the case is not entitled to be considered as an authoritative overruling of the former cases. And those cases, we think, should not be overruled, for, as a proposition in criminal law, the doctrine enunciated by them rests upon reason and authority. As has been already said, the apprehension of danger to life or limb which justifies a man for taking the life of another must be an honest one—one that is well grounded, and must arise out of a reasonable cause; but a cause which originates in the fault of the person himself—in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Error of apprehension the law overlooks when a man is called upon to act on appearances; but it does not overlook dishonesty of apprehension. Hence a real or apparent necessity brought about by the design, contrivance, or fault of the defendant, cannot be availed of as a defense for the commission of a crime. (*State vs. Rippey, supra; Stewart vs. State*, Ohio St. 66; *State vs. Neeley*, 20 Iowa 109; *State vs. Roach*, 34 Geo. 78; *State vs. Eiland*, 52 Ala. 322; *State vs. Evans*, 44 Miss. 762; *State vs. Gainey*, 97 Ill. 271.)

Yet it is not to be doubted that a person accused of crime may show in justification that although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But that is not the present case. And, in the absence of such circumstances, it must be true as a legal proposition that where a defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense, which justifies a homicide, does not include the right of attack.

Secondly—The instruction numbered twenty-two was correct. In effect the Court told the jury that if they were satisfied “beyond a reasonable doubt, from all the facts and circumstances in the case,” of the existence of the facts which he stated to them, and which the evidence tended to prove, then the defendant would be guilty of murder or manslaughter, as they might determine.

It is allowable for a Court to give a hypothetical instruction to the jury, provided the province of the jury be not invaded. No invasion took place in this instance; the jury were left entirely free, in the exercise of their functions, to find the facts stated to them, and were cautioned that the facts must be found by them, from the evidence, beyond a reasonable doubt.

Thirdly—A witness for the prosecution on his direct examination testified that McCool (the deceased) and a younger brother of the defendant on the morning of the homicide came along and halted right in front of the door of the saloon near which the witness was seated. When they halted, McCool said to young Westlake, "I was not alluding to you or your family." At the time of the remark the witness did not observe that the defendant was present, but he came forward and joined them immediately afterward, and commenced the difficulty with McCool, in which the latter was killed. To the remark counsel for defendant "objected as evidence and moved that it be stricken out." No ruling was *then* made by the Court upon the objection or motion. Impliedly, the Court reserved its ruling, and no exception was taken by defendant. But the Court did not, at any time during the trial of the cause, pass upon either, and this omission of the Court is assigned as error. But the defendant did not at any time ask for a ruling; and where a defendant makes no effort to obtain a definite ruling, upon an objection to a question asked of a witness, or a motion to strike out the answer to the question, the ruling upon which has been reserved, the legal presumption is that a ruling was waived. (*People vs. Sanford*, 43 Cal. 32.) This presumption also arises from the fact, disclosed by the record in this case, that the defendant did not make the omission of the Court to rule upon his objection or motion to strike out part of the grounds of his motion for a new trial.

Fourthly—A medical witness, called by the defendant, after testifying that he had made a *post-mortem* examination of the body of deceased, was asked this question: "State, from the examination you gave the wound, the course of the ball and the condition of the deceased, whether, if he were moving in a northwesterly direction, or standing facing a northwest direction, he could have received that wound from the pistol-shot fired by a person standing north of him and facing south?" Objection was taken to the question, which was sustained, and the ruling is assigned as error.

Whether the wound of which the deceased died could have been inflicted by a pistol-shot fired by the defendant from a

certain direction was a fact to be found by the jury from the evidence of the circumstances in which the homicide was committed, or to be inferred from the relative position of the parties at the time the shot was fired; it was not such a matter of science or skill as required the opinion of an expert. (*People vs. Smith*, 4 Pac. C. L. J. 213.) There was therefore no error in excluding the opinion of the witness. Nor did the Court err in excluding the testimony of the same witness as to a declaration made by McCool, half an hour after he had been shot, to the witness, who was his attending physician. The declaration related to what he then meant to do to the defendant for shooting him. Declarations of a person who has been shot, made half an hour after the shooting, as to what he intends to do to the man who shot him, are not part of the *res gestæ* of the shooting. (C. C. P., 1850.)

Lastly—It is contended that in excluding the testimony of John Stewart, a witness for the defendant, as to the communication to defendant of a threat which had been made by McCool against the defendant, there was error. But the threat and the communication of it to the defendant had been proved by the testimony of another witness, who was unimpeached and uncontradicted, and the defendant himself testified on the same subject. The exclusion of the testimony of one witness as to a fact which has been proved by the uncontradicted evidence of another witness is not a prejudicial error (*People vs. Reel*, 48 Cal. 553); for the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. (Sec. 1844, C. C. P.)

There is no error in the record, and the judgment and order appealed from are affirmed.

We concur: Morrison, C. J., Myrick, J.

I concur in the judgment: Ross, J.

DISSENTING OPINION.

The following instruction, in which the Court said, "If you believe, beyond a reasonable doubt, from the evidence, that the defendant commenced the affray with the deceased in which the mortal wound was given, then his fear of danger, if really entertained, would not justify him in taking the life of the deceased," cannot, in my judgment, be reconciled with that provision of the Penal Code which makes homicide justifiable when committed by a person in the lawful defense of such person, even if he was the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed. (Pen. C., 177.) This error, if error it be, is repeated in several other instructions.

SHARPSTEIN, J.

DEPARTMENT No. 2.

[Filed December 22, 1882.]

No. 7413.

HARMON, APPELLANT, VS. PAGE ET AL., RESPONDENTS.

CORPORATIONS—SUBSCRIBERS—EQUITY—INSOLVENCY—CREDITORS—CONTRACT.

When a stockholder has contracted with a commercial corporation to pay in a certain amount of the capital stock, he is bound by such contract, and a Court of equity will enforce it for the benefit of creditors, on the insolvency of such corporation.

1D.—CONSTITUTION—REMEDY. The above rule is not affected by the constitutional provisions relating to stockholders in corporations, nor by Section 322 of the Civil Code.

1D.—STATUTE OF LIMITATIONS. There is no averment in the complaint of the existence of any fact that would put the Statute of Limitations in motion; no disbandment of the corporation; no cesser of business; no call upon the subscribers to pay; and therefore the complaint is not subject to demurrer on the ground of limitation.

Appeal from Fourth District Court, San Francisco.

Roche & Desbeck, and *J. W. Carter*, for appellant.

McAllister & Bergin, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

The complaint shows that the defendant, the "City Paving Company," is a corporation, duly organized and formed under the laws of the State of California, on or about the 10th day of November, 1868, with a nominal capital stock of \$500,000, divided into 5,000 shares of \$100 each. It also avers that the defendants, respectively, at the times mentioned in the complaint, became the subscribers to shares of the capital stock of the corporation, setting forth the number of shares subscribed for by each of them. It further alleges that none of the defendants have ever paid into the corporation any portion of the capital stock subscribed for by them, and charges that the whole amount that each defendant subscribed remains due and unpaid. The complaint further charges that on the 2d day of May, 1878, the plaintiff recovered a judgment against the City Paving Company in the District Court of the Fourth Judicial District for the sum of \$10,500, which judgment still remains in full force and effect, and wholly unsatisfied. That an execution was issued on such judgment against the property of the City Paving Company, which was placed in the hands of the Sheriff of the city and county of San Francisco, and has been returned wholly unsatisfied. That the indebtedness upon which the aforesaid judgment was recovered accrued

between the 9th day of May, 1873, and the 15th day of October of that year. There is a further averment in the complaint of the total insolvency of the City Paving Company, and that all of the subscriptions of the defendants to the capital stock of the corporation were made prior to the creation of the indebtedness to the plaintiff. To the complaint the defendants demurred, the demurrer was sustained by the District Court, and plaintiff has taken this appeal.

The questions involved in the case are somewhat new in this State, and have never before (within our knowledge) been presented to the Supreme Court for decision. An examination of the authorities shows, however, that a suit in equity by creditors of a corporation, to compel the subscribers to the capital stock to pay in their subscriptions, is a very common proceeding not only in England but also in this country. In *Angell & Ames on Corporations* (Section 602) we find the law thus stated: "It has been held that when the Trustees, or other proper agents for that purpose, neglect to call in the debts due by the stockholders of a corporation for stock, so as to enable the company to pay its debts, a creditor, by a bill in chancery, can compel such agents to enforce contribution from the stockholders according to their subscriptions." In the case of *Henry vs. The Vermilion Railroad Company* and other stockholders (17 Ohio 189), the Court says: "These bills are filed under the Act directing the mode of proceeding in chancery. They set forth judgments at law recovered against the company; further, that after efforts made, they could not be collected on execution, and that the individual defendants are indebted to the company as stockholders, upon their stock subscriptions. The principle has already been recognized by this Court, that a creditor's bill will lie against a stockholder of an incorporated company, to compel him to pay over to a judgment creditor the amount of his subscription, which had not before been paid to the company (11 Ohio R. 273; 13 *id.* 197); and the authority of these cases we find no reason to deny."

In the case of *Haskins vs. Harding* (2 Dillon's C. C. R. 106), Dillon, Circuit Judge, uses the following language: "Without the aid of any statute, the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to enforce payment for the benefit of creditors." [Citing numerous authorities.] In the case of *Ogilvie et al. vs. The Knox Insurance Company* (22 How. 380), the Supreme Court of the United States

maintained the same principle in a case where the subscriptions were obtained by fraud. It is there said that, "in a bill by a judgment creditor against an incorporated insurance company and its stockholders, to compel the latter to pay up the balance due on their several subscriptions to the stock, they cannot be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentations of the agent of the company. It is too late, after the investment is found unprofitable and debts incurred, for stockholders to withdraw their subscriptions, under such a pretense or plea."

The case of *Adler et al. vs. The Milwaukee Patent Brick Manufacturing Company* and others (13 Wis. 57) is a strong case to the same effect. The language of the Court is that "the stockholders, being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public and a substitute for the individual liability which exists in other cases. So far as the creditors are concerned, it is regarded in the law as a trust fund, pledged for the payment of the debts of the corporation. * * * If, therefore, by the willful or stubborn inaction of the directors or stockholders, the company fails to meet its obligations and perform its duties, a Court of equity will, on a proper application, afford the requisite relief."

In a very recent case—*South Mountain Con. Mg. Co.*, 7 Sawyer, 30—Hoffman, J., says: "I do not question the power of the Court to compel contribution of unpaid subscriptions to the capital stock of an insolvent corporation for the purpose of paying its debts." The learned Judge cites numerous decisions of the Supreme Court of the United States in support of his view of the law.

It may be remarked that the case of the *South Mountain Consolidated Mining Company* was carried by writ of review to the Circuit Court, was there affirmed (Pamphlet, Nov. 6, 1882), and the opinion rendered by the learned Circuit Judge is relied upon by the defense in this case. But with due deference to the very able counsel, we must say that we do not think that it sustains defendants' position. Mr. Justice Sawyer there says: "Mining corporations in California are, in these particulars, *sui generis*. They are organized and carried on upon principles, in these respects, wholly different from banking, railroad, insurance and other like commercial corporations having a *subscribed* capital stock. There is no agreement, express or implied, to pay up any particular

amount of stock, and no one understands that there is. Certainly none is intended by the parties. If there is a contract to pay up the full nominal amount of the stock, it could be called in from time to time without regard to the liabilities or needs of the corporation. There being no such agreement, there is no contract or agreement to pay up capital stock, which can constitute assets of the corporation. There is a mere power of assessment under the statute and by-laws—not a contract to pay in installments upon call; but this mere power to assess, independent of any contract, express or implied, to pay up the nominal amount of capital stock in installments, is not assets of the corporation.”

The distinction between the case there considered, which involved the liability of a stockholder in a *mining corporation* and the liability of a *subscriber to the capital stock* of a banking, railroad, insurance or other commercial corporation, such as we are dealing with in this case, is clearly marked out in the opinion of Mr. Justice Hoffman. He says: “These principles apply to all cases where an obligation has been created or incurred on the part of a stockholder to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *chase in action* or equitable assets of the corporation, on well-settled and familiar principles.”

Other authorities might be cited in support of the views above presented, but we think we have sufficiently shown that when a stockholder has *contracted* with the corporation to pay in a certain amount of the capital stock, he is bound by such contract, and a Court of equity will enforce it for the benefit of creditors of the insolvent corporation.

But it is claimed that the rule above stated has been changed in this State. In the first place, our attention has been called to Section 2, Article XII, of the new Constitution, which provides that “Dues from corporations shall be secured by such individual liability of the corporators and other means as may be drescribed by law;” and also to Section 3 of the same Article, which declares that “Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association.”

But the above provisions of the new Constitution do not apply to this case, as the liability of the stockholders accrued before the new Constitution was adopted. The provisions of the old Constitution on this subject, however, were substantially the same. By Section 32, Article IV, (Cons. of 1863,) it is provided: "Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law." And Section 36 of the same Article reads as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for his proportion of all its debts and liabilities."

We are also referred to Section 322 of the Civil Code respecting the liability of stockholders.

But is the right of the creditors of the corporation to pursue the subscribers in equity, as has been attempted in this case, taken away by the provisions of the Constitution or the Act of the Legislature? We think not, and will endeavor to show that it is not, by reference to the authorities.

Thompson, in his recent work on "The Liability of Stockholders," says (Sec. 265): "The general rule is that, although a creditor has a concurrent remedy against a shareholder at law, this does not oust the jurisdiction of the Courts of equity." "Section 266. The rule obtaining in some of the States, in case of a statutory liability, is that the creditor has a concurrent remedy at law." "It has been held, under a statute of individual liability, that where a suit in equity has been instituted for such a purpose (the benefit of all the creditors), no creditor can institute a separate suit for the enforcement of such liability in his own behalf." (Section 275.)

The case of *The Bank of the United States vs. Dallam et al.* (4 Dana, 575), is an authority on this subject. That was a suit in chancery against the shareholders in a corporation called the Fayette Paper Manufacturing Company, the charter of which contained the following clause: "Provided, however, that the estate and property of every individual shareholder, who holds or possesses stock in said corporation, shall at all times be liable and subject in law, in proportion to his or her interest therein, to pay and satisfy all debts and demands contracted by said corporation during the time he or they held stock therein, upon a failure of the corporate funds to discharge the same." The plaintiff had recovered a judgment against the corporation, and failing to collect the money from it, prosecuted his suit on the equity side of the Court against the shareholders, and the Court there says:

"As the judgment and return on the execution thereon entitled the bank to demand the amount of its debt from stockholders in their personal right, and as they are liable, not *in solido*, but only distributively, in the ratio of their several interests, and are moreover multitudinous, we have no doubt that the Circuit Court, *sitting in equity*, had jurisdiction over a joint bill filed against all of them, concurrently with a Court of law, over separate actions against each of them, upon his sole and several liability."

The case of *Matthews et al. vs. Murray et al.* (24 Md. 527), was a suit in equity against the stockholders in a company incorporated under an Act containing the following provision: "The stockholders shall be severally and individually liable to the creditors of the Company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such Company," and the bill was entertained by the Court. In the later case of *Norris vs. Johnson* (34 Md. 489), the Court uses the following language: "In such case (against the stockholders) it is unanimously conceded the creditors may have relief in equity, but the controverted question is, have they not also the right to sue at law?"

In Massachusetts it has been held that the creditor *must* pursue his remedy against the shareholders in a Court of equity. In the case of *Harris vs. The First Parish in Dorchester* (23 Pick. 112), the Court holds that "An action at common law does not lie in favor of a bank, against a stockholder, to enforce the provision in Revised Statutes, C. 36, Sec. 30, that if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the Directors, the stockholders shall, in their individual capacities, be liable to pay the same; but the remedy is by bill in equity."

The case of *Perry et al. vs. Turner et al.* (55 Mo. 418), is an authority sustaining the jurisdiction of a Court of equity in a proceeding against the stockholders; and the cases of *Pollard vs. Bailey* (20 Wall. 520), and *Hatch vs. Dane* (101 U. S. 205), are authorities in support of the proposition we have been considering.

It appears to us to be well settled that a suit such as was instituted by the plaintiff properly lies in a Court of equity, unaffected by any remedy the creditor may have under the provisions of the Constitution and the statute. Indeed, it may be that the constitutional and statutory remedy is a broader one than that arising upon the contract of subscrip-

tion, for in a suit upon the latter the recovery cannot extend beyond the amount of the subscription, whereas the liability created by the law, independent of any contract, is for the stockholder's proportion of all the debts contracted or incurred during the time he was such stockholder.

There is but one other question in the case, and that relates to the Statute of Limitations. The indebtedness upon which the judgment was recovered accrued between the 9th of May and the 15th of October, 1873; the date of the judgment is May 2, 1878, and the complaint in this case was filed August 30, 1878; and it is claimed, on behalf of the defendants, that the Statute of Limitations has run in their favor. An examination of the authorities, however, will show that the point is not well taken. Referring again to Thompson on the Liability of Stockholders, we find the law thus stated: "Where the liability is for unpaid balances on stock subscriptions, there is authority for the position that the statute does not begin to run (if at all) before a notorious disbandment of the company and cesser of business; and there is good sense in this view. However this may be, it is clear of doubt that in case of a company which continued to transact business, and which has been a 'going company,' without interruption, from the time of the subscription of the stockholder until the commencement of the suit for calls, the statute would not commence to run until a call made by the stockholder to pay it; and, for stronger reasons, it would not begin to run until that time, if the controversy were between a creditor of the corporation and a shareholder." (Sec. 291.) In the case of *Curry vs. Woodward* (52 Ala. 376), the Court say: "Until the call was made, or there was an evident disbandment of the company and a relinquishment of business, the Statute of Limitations would not begin to run." To the same effect is the case of *Cherry et al. vs. Lamar et al.* (58 Ga. 541), in which a bill was filed by the creditors of a corporation to subject to the payment of their judgment against it certain unpaid stock subscribed by the defendants.

A defendant cannot avail himself of the Statute of Limitations, by demurrer to the complaint, unless it affirmatively appears therefrom that the action is barred by a provision of that statute; and in this case there is no averment of the existence of any fact that would put the statute in motion. No disbandment of the company, no cesser of business, no call upon the subscribers to pay, is averred in or appears from any fair construction of the complaint.

We are of opinion that the complaint sets forth a good cause of action against the defendants, and the demurrer should have been overruled.

Judgment reversed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 7227.

DOVE ET AL., RESPONDENTS, vs. NUNAN, APPELLANT.

EXECUTION — EXEMPTION — HORSE — WAGON — TEAMSTERS. In order to entitle a party to claim as exempt from execution two horses and a wagon, under the sixth subdivision of Section 690 O. C. P., he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster or other laborer, and that he habitually earns his living by the use of such horses and wagon.

Appeal from Superior Court, San Francisco.

C. F. Hanlon, for appellant.

A. W. Thompson, for respondents.

Ross, J., delivered the opinion of the Court:

The property in controversy consists of two horses and a wagon, and is claimed by the plaintiffs to have been exempt from execution by virtue of the sixth subdivision of Section 690 of the Code of Civil Procedure.

The Court below found that "the plaintiffs were and are a firm doing business as coal dealers. * * * That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor; all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses—the subject of this suit—for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiffs' coal-yard, and other coal and wood yards, to the place where the plaintiffs retailed the same, as above found herein."

The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their

families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, etc., under the sixth subdivision of Section 690, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster or other laborer, *and that he habitually earns his living* by the use of such horses, etc. (Code of Civil Procedure, Sec. 690; *Brusie vs. Griffith*, 34 Cal. 302.)

The findings in this case do not show that state of facts. Judgment and order reversed.

We concur: McKinsty, J., McKee, J.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 7256.

DYER, RESPONDENT, VS. HUDSON ET AL., APPELLANTS.

STREET LAW—CONTRACT—MACADAMIZING—GRADING. Under the San Francisco street law of 1872 (Stats. 1871-2, p. 804) the Board of Supervisors could not award a contract for macadamizing before the street was graded.

ID.—STATEMENT—SPECIFICATIONS—NEW TRIAL. The alleged error of the Court below in holding an order extending the time for completing the contract, made after the expiration of the period originally fixed, to be *valid*, is not specified in the statement on motion for a new trial, and therefore the point decided in *Beveridge vs. Livingston*, 54 Cal. 54, was not considered on this appeal. (C. C. P., 659, Sub. 3.)

Appeal from Superior Court, San Francisco.

L. H. Whittemore, for appellants.

D. M. Wood, for respondent.

By the COURT:

The alleged error of the Court below in holding an order extending the time for completing the contract, made after the expiration of the period originally fixed, to be *valid*, is not specified in the statement on motion for a new trial. The point decided in *Beveridge vs. Livingston* (54 Cal. 54) will not be considered on this appeal. (C. C. P., 659, Sub. 3.)

But the record before us presents the point that the time for completing the contract for grading had not expired, nor was the grading in fact completed, either when the macadam contract was awarded or when the macadamizing should have been finished according to the contract as awarded.

The power of the Board of Supervisors to let a contract for macadamizing must be determined by the condition of things when such contract is awarded. The time for doing

the work may be extended by the Board, but the Board may not anticipate the extension when the original award is made. The law supposes the Board to intend that the contractor shall perform his work within the time fixed by his contract. In the case before us the advertisement for sealed proposals contained a notice that the macadamizing was to be done within sixty days after the contract was signed. The law required the work to be commenced within fifteen days after the award. By Section 6 of the Act of April 1, 1872, (Stats. 1871-2, p. 804,) owners of property facing the improvement may *elect*, "within five days after the first publication of the award," to do the work. It is apparent that, if the Board can award a contract for macadamizing before the street is graded, the property-owners may be deprived of the right, secured by the statute, of doing the work themselves, and the power can only be employed in such manner as cannot deprive the property-owners of the statutory right.

Judgment and order reversed, and cause remanded for a new trial.

IN BANK.

[Filed December 28, 1882.]

No. 8319.

SMITH, RESPONDENT, vs. SMITH, APPELLANT.

DIVORCE—CRUELTY—FINDING. In this case the findings held insufficient to support the judgment of divorce.

ID.—ID. The only fact of alleged cruelty expressly found is that defendant deserted her husband and children, and went to Germany for the purpose of perfecting herself in the art of painting, and was abroad three months.

ID.—ID. The Court also found that "the repeated acts of cruelty, as established by the evidence, upon the part of said defendant toward her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering." *Held:* The finding is but a conclusion of law, and does not find any fact in issue in the case.

Appeal from Superior Court, Los Angeles County.

Thom & Stevens and *Howard*, for appellant.

Brunson & Wells and *Hupp*, for respondent.

By the COURT:

Plaintiff sued defendant for a divorce on the ground of extreme cruelty, alleging in his complaint various acts claimed to constitute cruelty, all of which are denied in defendant's answer. A decree of divorce was entered in the Court below, and one of the errors assigned on this appeal is that the

findings are insufficient to support the judgment. The following are the findings on the question of extreme cruelty:

"V. That the conduct of the defendant toward the plaintiff, and her treatment of her children during the last several years, has, upon repeated occasions, been extremely cruel, and that in the month of June, 1880, without the consent or knowledge of the plaintiff, she deserted her husband and children, and went to Dusseldorf, in Germany, for the purpose, as she now claims, of perfecting herself in the art of painting, and remained absent from her said husband and children until the 17th day of September thence next ensuing, upon which day she returned to Los Angeles city.

"VI. That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant toward her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering."

It will be observed that the only fact of alleged cruelty expressly found is that the defendant deserted her husband and children, and went to Dusseldorf, in Germany, for the purpose of perfecting herself in the art of painting, and was abroad from June until September, 1880. This act did not of itself constitute such cruelty as entitled the plaintiff to a divorce. (1 Bishop on Marriage and Divorce, Sec. 738.) The sixth finding is but a conclusion of law, and does not find any fact in issue in the case. (*Polhemus vs. Carpenter*, 42 Cal. 386.)

Judgment reversed and cause remanded.

IN BANK.

[Filed December 20, 1882.]

No. 10,746.

PEOPLE, RESPONDENT, vs. MITCHELL, APPELLANT.

CRIMINAL PRACTICE—ARGUMENT—EVIDENCE—DISTRICT ATTORNEY. In his closing argument to the jury the District Attorney was permitted by the Court—notwithstanding the objection and exception of defendant—to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced. *Held*, error sufficient to warrant a new trial.

Id.—Id. The Court below ruled that the District Attorney was justified in departing from the testimony, because counsel for defendant had done the same thing. But *held*, on appeal, if the record showed (which it does not) that such statements had been made by counsel for defendant, the fact would not cure the error of the Court.

Appeal from Superior Court, Butte County.

Reardon & Freer and Lusk, for appellant.

Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

In his closing argument to the jury the District Attorney was permitted by the Court - notwithstanding the objection and exception of defendant—to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced.

The impropriety of the statements, and apparently their materiality, were conceded by the District Attorney and by the Court, but the Court held that the District Attorney was justified in departing from the testimony, because counsel of defendant had done the same thing. If the record showed (which it does not) that such statement had been made by counsel for defendant, the fact would not cure the error of the Court. The District Attorney might have objected to such statements on the part of defendant's counsel when they were made, or have asked the Court specifically to charge the jury that they were to be disregarded. But to say that because an impropriety on the one side has passed unrebuked, it ceases to be an impropriety when committed on the other, would lead to confusion worse confounded. The jury would have the allegations of fact of the respective counsel pitted against each other, and the fate of a defendant would, perhaps, be determined not by the evidence in the case, but by the degree of confidence which the jury might repose in the honesty or intelligence—or both combined—of one or the other of the counsel. For counsel to state a fact not proven, or sought to be proven, is, in effect, to place unsworn evidence before the jury, and when improper evidence is admitted without objection on the one side, this will not authorize improper evidence on the other. (*Donnelly vs. Curran*, 54 Cal. 282.) Only sworn testimony can go to the jury. (*People vs. Wheeler*, 9 Pac. C. L. J. 381, and cases there cited; 41 N. H. 317; 66 Me. 504; 67 N. Y. 638; 22 Iowa 504; 49 Ind. 33, 124; 51 *id.* 507; 15 Ga. 638; 25 *id.* 225; 33 Conn. 471; 75 N. C. 306.)

In *Brown vs. Swineford* (44 Wis. 291), Ryan, C. J., said: "It sufficiently appears in the present case that the learned counsel for plaintiff did not properly confine his closing argument to a reply. * * * The learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence." "Enough appears to show, not only that the learned counsel commented on facts not in evidence, but in effect testified to facts himself." * * * "The appellant took his exception, and his counsel now supports it by numerous cases, some of which are—so far as they go—admirable discussions of professional ethics,"

etc. "All of them support the rule now adopted by this Court, that it is error sufficient to reverse a judgment, for counsel against objection, to state facts pertinent to the issue, and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse the judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case. *Tucker vs. Henniker*, 41 N. H. 317; *State vs. Smith*, 75 N. C. 306; *Ferguson vs. State*, 49 Ind. 33; *Henies vs. Vogel*, Sup. Ct. Ill., 7 Cent. L. J. 18."

"Doubtless the Circuit Court can, as it did in this case," (but as the Superior Court in the case, the record of which is now before us, *did not*,) "charge the jury to disregard all statements of fact not in evidence. But it is not so certain a jury will do so," etc.

There are cases in other States, it is said, in conflict with the rule above laid down. But the rule is reported by principle; in this State by precedent, and, as we believe, by the great weight of authority everywhere.

People vs. Barnhardt (filed November 9, 1881,) has no direct bearing upon the question we have been considering. In that case there was a dispute between counsel as to the exact testimony of a witness. When such a dispute arises, if the presiding Judge is not prepared from his memory or notes to settle it—but is convinced that testimony was given with respect to the point as to which the dispute has arisen—he may submit the matter to the recollection of the jury. But, in the case now before us, there was no pretense in the Court below that there was any evidence tending to prove the matters asserted to be facts by the District Attorney.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., Sharpstein, J., Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed January 2, 1883.]

No. 8532.

SOUTHERN PACIFIC RAILROAD CO., APPELLANT,

VS.

WHITE ET AL., RESPONDENTS.

DEFAULT—APPEAL—ORDER—PRACTICE. The appellate Court only interferes with an order vacating a default judgment when there is a manifest abuse of discretion.

Appeal from Superior Court, Los Angeles County.

Glassell & Smith, for appellant.

Brunson & Wells, for respondent.

By the COURT:

In this case, which was ejectment, there was judgment by default for plaintiff against three defendants, who moved to set aside the judgment. The Court granted the motion, on paying costs of motion and entry of judgment. From this order plaintiff appealed.

We have examined the affidavits on which the Court set aside the judgment, and find no abuse of discretion which would warrant this Court in interfering with the order vacating the judgment. This Court only interferes with such orders when there is a manifest abuse of discretion.

Order affirmed.

IN BANK.

[Filed December 13, 1882.]

No. 8119.

DEWEY, APPELLANT, vs. FRANK ET AL., RESPONDENTS.

NEW TRIAL—SURPRISE. In this case there was no surprise, in its legal meaning, for which a new trial should have been granted.

ID.—NOTE. See opinion of Department Two in this case, 9 Pac. C. L. J. 813.

Appeal from Superior Court, Los Angeles County.

Brunson & Wells, for appellant.

Glassell & Smith, for respondents.

By the COURT (Ross, J., dissenting):

This case was heard in Department Two of this Court, and a decision was rendered July 28, 1882. (9 Pac. C. L. J. 813.) Subsequently a hearing by the Court in bank was granted, which hearing has been had. We have examined the transcript and the points made, and are satisfied with the decision of the Department. As the new trial was granted on the ground of surprise, we must take the findings, so far as there is evidence to support them, as true on all questions of fact found thereby. Where a new trial is granted upon a stated ground, we cannot, in searching for other grounds for sustaining the order, consider the facts as other than found, if there be evidence to support the findings. Otherwise we should be speculating upon what *might* have been the decision as to the facts rather than relying upon what *was* the decis-

ion. As stated in the opinion of the Department, there was no surprise in its legal meaning for which a new trial should have been granted. The defendants were informed at the commencement of the suit, March 10, 1880, that an action was brought to recover a balance alleged to be due on the account stated. They knew before that day that their agent, Mr. A. S. Frank, had been sent by them to the plaintiff to make some adjustment of the affairs between them and the plaintiff. They knew that the mission of A. S. Frank and its result might be of importance, and might be used by plaintiff in making out his case. They had at the trial on the 18th of December, 1880, the testimony of the plaintiff as to the result of the mission, and made no motion for a continuance, nor expressed any surprise other than such as would arise from evidence contrary to their own version of the facts. The case was then argued and submitted and decided February 28, 1881. Not till after the decision did they present the view of surprise; and we think it was then disappointment rather than surprise; therefore the Department was correct in saying there was no surprise in its legal meaning. See Section 657 C. C. P.: "Surprise, which ordinary prudence could not have guarded against."

The order is reversed and the cause is remanded.

I dissent: Ross, J.

DEPARTMENT No. 1.

[Filed January 2, 1883.]

No. 8442.

O'CONNOR, APPELLANT, vs. FOGLE, RESPONDENT.

STATUTE OF LIMITATIONS—TAXES—EJECTMENT. Complaint filed May 16th, 1881. Defendant's plea of the Statute of Limitations held not sustained by the testimony. He did not claim under color of title. The land was not protected by a substantial inclosure, nor exclusively cultivated by him; nor did he pay the taxes upon it. (325 C. C. P.)

Appeal from Superior Court, Los Angeles County.

Bicknell & White, for appellant.

Gould, Blanchard, and Brunson & Wells, for respondent.

McKEE, J., delivered the opinion of the Court:

This appeal is from the final judgment and order denying a motion for a new trial in this case. The action was ejectment. By the record it appears that the plaintiff claimed a right of entry to the demanded premises through a patent

which had been issued by the State of California April 24, 1874, to the immediate grantor or the plaintiff. The patent vested in the patentee title to the land, and, as his grantee, the plaintiff was entitled to recover possession unless his cause of action was barred by the Statute of Limitations. That was the defense interposed to the action by the following answer:

"And for a further and separate answer and defense, the defendant alleges that he has been in the quiet, peaceful and exclusive possession of said land in the plaintiff's complaint described, holding and claiming the same adversely to said plaintiff, and adversely to all other persons, for more than five years before the commencement of this suit, to wit, ever since and prior to September 1, 1870, and that neither the plaintiff nor either of his ancestors or ancestor, predecessor or grantor, was ever seized or possessed of the said land, or any portion of the same, within five years before the commencement of this action, or at all."

The evidence upon the issue raised by this answer tended to prove that the defendant entered on the land, in the year 1870, as a qualified pre-emptor. At that time the land was part of the public domain of the United States within this State. While residing on the land with his family, the defendant, in December, 1870, filed his declaratory statement in the United States Land Office, in the district within which the land was situated. When he filed this statement the township had been surveyed by the United States authorities, the survey was approved, and the plat of the survey had been filed in the proper United States Land Office. Subsequently, however, to the filing of the township plat, and of the declaratory statement, the land was listed to the State of California, in fulfillment of a selection which had been made by the State prior to the United States surveys of the land; and on April 24, 1874, the State issued the patent to the plaintiff's grantor. Against the listing of the land to the State the defendant protested, and contested the title of the State; but the United States authorities decided the contest against him, and in December, 1876, canceled his declaratory statement. Yet the defendant continued to reside with his family on the land, as before the issuance of the patent, and has since continuously resided thereon, claiming title to it against the plaintiff and others; but his claim of title was not founded upon any instrument in writing, judgment or decree of a competent Court; it was founded only on what was claimed to have been an adverse possession of the land for the statutory time. Of course, if

there was a sufficient possession to put in motion the Statute of Limitations, the time of the statute began to run in favor of the defendant only from the date of the patent to the plaintiff; it did not run against the United States nor the State. (*Davis vs. Davis*, 26 Cal. 46; *Johnson vs. Van Dyke*, 20 id. 228; *Beach vs. Gabriel*, 29 id. 580; *Subichi vs. Aguilar*, 43 id. 291; *Manley vs. Howlett*, 55 id. 94.) From the date of the patent to the commencement of the action there was a period of seven years, and the question is, Was the possession of defendant during that time adverse?

To constitute such a possession in favor of one who does not claim under color of title, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved.

"*Provided, however*, that in no case shall adverse possession be considered established under the provision of any section or sections of the Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county or municipal, which have been levied and assessed upon said land." (Sec. 325, C. C. P.) That was the law in force at the commencement of the action upon the subject of adverse possession, and to entitle the defendant to its benefits he was bound to show a compliance with its provisions. According to the uncontroverted evidence of the defendant himself, he failed to show an adverse possession, for the land was not protected by a substantial inclosure; nor has it been exclusively cultivated by the defendant; nor has he paid the taxes on the land; on the contrary, it is an uncontroverted fact that the plaintiff has paid the taxes every year.

Upon the subject of his occupation the defendant, upon his examination as a witness in his own behalf, testified that he had built a house, dug several wells, and made some corrals on the land after he had entered on it as a pre-emptor; that since then he had continuously resided upon it, "claiming it all as a pre-emptor of Government land, adversely to everybody," and cultivated a portion of the tract—at no time exceeding twenty or twenty-five acres—for several years. Assuming that such an occupation, without an actual inclosure of the tract, would be sufficient, yet, as the defendant failed to pay the taxes on the land, he has not performed the acts required by the Statute of Limitations. In consequence of that failure, there was no such adverse

possession taken and held by him, with the requisites and circumstances specified in the Code, as entitled him to the benefit of the Statute of Limitations. Therefore, in law, he is to be regarded as a mere trespasser. The verdict was therefore against the evidence and the instructions of law given by the Court, and should have been set aside.

Judgment and order reversed, and cause remanded.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed December 20, 1882.]

No. 8466.

IN THE MATTER OF THE ESTATE OF H. LOHSE, DECEASED.

ESTATE—ALLOWED CLAIM—CONTEST—BURDEN OF PROOF. As to a claim which ranks among the acknowledged debts of the estate, to be paid in due course of administration (1497 C. C. P.), the burden is on those who contest it at the hearing of the executor's account.

Appeal from Superior Court, Placer County.

Jo. Hamilton, for appellant.

Tuttle & Tuttle, for respondents.

MYRICK, J., delivered the opinion of the Court:

In due time J. Zeigenbein presented in due form to the executor a claim against the above estate for \$18,628.35. The executor indorsed upon the claim his allowance thereof at the sum of \$18,548.35, rejecting an item of \$80. The Judge of the Superior Court indorsed on the claim his approval of the allowance of the executor. The executor having filed his account and report of his administration, A. H. Gates and others, creditors of the estate, contested the account, and excepted thereto, especially the claim of Zeigenbein, and stated in writing their grounds of contest. A day for hearing the contest was set. At the hearing the Judge of the Court below "ruled that the affirmative of the issue lay with the parties who sought to sustain the report of the executor."

This ruling was error. Section 1497 C. C. P. declares that a claim allowed and approved, and filed, shall be "ranked among the acknowledged debts of the estate, to be paid in due course of administration." When a claim, in the course of allowance and approval, reaches the point that it is to rank among the acknowledged debts of the estate, we apprehend that the claimant may rest on that point until he be attacked.

There are at least two points in the administration of an estate at which an approved claim may be contested, viz.: when application is made for the sale of property (Sec. 1540 C. C. P.), and when an account is rendered for settlement (Sec. 1636 *id.*); but, in making the contest, the contestant has the affirmative, and must show cause. It is not necessary to consider how far the allowance and approval of a claim resemble or give the effect of a judgment; it is sufficient to say that such a claim is to "rank among the *acknowledged* debts of the estate, to be paid in due course." If it be an acknowledged debt, it is good until cause be shown.

Orders reversed and cause remanded for further proceedings.

We concur: Sharpstein, J., Morrison, C. J.

New Law Publications.

WOOD ON LIMITATION OF ACTIONS. H. G. Wood, Author; Soule & Bugbee, Boston, Publishers.

The author has already established for himself a reputation as an able law-writer. His excuse for writing a new text-book on this important subject is a good one—"The radical changes wrought in the Statutes of Limitations in the several States of this country within the last twenty years, and in the theories applicable thereto." He has done his work thoroughly, and has given us a very useful and complete text-book.

LAW AND LAWYERS IN LITERATURE. By Irving Browne. Soule & Bugbee, Boston, Publishers.

The object of this book is, as the author puts it, "to show how the law and the lawyers have been depicted in literature." We wish that we had room to print the whole preface. It is one of the best things in the book. He has given us copious extracts from the writings of the dramatists, novelists, moralists, poets, wits and song-writers of the age, showing that it has always been easier to make fun of the law and of the lawyers than to disobey the former with impunity and successfully evade the well-earned fees of the latter. We welcome this book. A constant perusal of its pages will reconcile us to high fees. We have a long score with which to get even.

Pacific Coast Law Journal.

VOL. X.

JANUARY 27, 1883.

No. 23.

Current Topics.

UNITED STATES CHIEF JUSTICES.

There has just been published a table of cases argued and adjudged in the United States Supreme Court from its foundation until last year. The compilation also gives some interesting facts in connection with our judicial history:

During the first decade of our history the Court saw three Chief Justices. The three Chief Justices next in order among them served for seventy-two years. John Marshall sat for thirty-four years and Roger B. Taney for twenty-eight years. Eight Justices had left the bench when the century began. Bushrod Washington, of Virginia, William Johnson, of South Carolina, John McLean, of Ohio, James M. Wayne, of Georgia, each served thirty years; Samuel Nelson, of New York, and John Catron, of Tennessee, twenty-seven; Robert C. Grier, of Pennsylvania, and Gabriel Duval, of Maryland, twenty-five; Nathan Clifford, of Maine, twenty-three; Smith Thompson, of New York, and Peter V. Daniel, of Virginia, twenty years. Joseph Story was the veteran of the bench. His term exceeded by one year that of Chief-Justice Marshall. Edwin M. Stanton was confirmed as a Justice while on his death-bed. Chief-Justice Waite and Justices Field and Bradley are the seniors of the present bench, having all been born during the last Administration of Madison. All their associates have been born since the last Administration of Monroe. Only one Supreme Bench Judge was nominated under each of the Presidents: Monroe, John Quincy Adams, Tyler, Fillmore, Pierce, and Buchanan. Washington appointed nine, Jackson and Van Buren seven, and Grant eight. Neither Harrison, Taylor, nor Johnson made any appointment.—*American Law Magazine.*

Supreme Court of California.

DEPARTMENT No. 2.

[Filed December 5, 1882.]

No. 7384.

TIERNAN, RESPONDENT,

VS.

HIS CREDITORS, APPELLANTS.

INSOLVENT — HOMESTEAD — DOUBLE HOUSE — DWELLING-HOUSE — APPEAL — OBJECTION. Appeal from an order, in insolvent proceedings, setting apart a homestead to the insolvent. *Held*, the declaration of homestead, stating the value of the premises to be \$8,000, is valid. (*Ham vs. Santa Rosa Bank*, November 17, 1882.)

ID.—ID. The premises consist of a parcel of land, which, with the improvements, are of the value of \$8,500. Upon the land is a double house, intended for two families; Tiernan (insolvent) never occupied more than the southerly half of the same—the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenements by which a person can go, within, from one house to the other. *Held*, under such circumstances, the Court erred in setting apart that portion of the premises not occupied by Tiernan. The claimant did not reside in the structure which was occupied by his tenant.

ID.—ID. The facts of this case are widely different from the case of a person residing in a building and renting a portion or portions of it to roomers or lodgers.

ID.—ID. Objection is made to the creditors being heard in this matter before they shall have proved their debts. It might be said that the petitioner himself, having put their names in his list of creditors, is estopped from making the objection, but it is enough to say that the matter was heard in the Court below without this objection being made, and it is too late to make it here for the first time.

ID.—ID. The existence of a mortgage on the premises in this case is no element in the ascertainment of the property to be set apart as a homestead or of its value.

Appeal from Superior Court, San Francisco.

Pillsbury & Titus, for appellants.

J. H. B. Wilkins, for respondent.

By the COURT:

This is an appeal from an order, in insolvent proceedings, setting apart a homestead to the insolvent.

1. The declaration of homestead stated the value of the premises to be \$8,000. The objection to the order on this ground is disposed of by the opinion of this Court in *Ham vs. The Santa Rosa Bank*, filed November 17, 1882.

2. The premises consist of a lot or parcel of land thirty-five feet wide, fronting on Mission street, in the city and county of San Francisco, by one hundred and twenty-two

and a half feet deep, which, with the improvements, are of the value of \$8,500. Upon the land is a double house, intended for two families; Tiernan never occupied more than the southerly half of the same—the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenants by which a person can go, within, from one house to the other. Under such circumstances, the Court erred in setting apart that portion of the premises not occupied by Tiernan. “The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated.” (C. U., Section 1237.) In this case the claimant did not reside in the structure which was occupied by his tenants. The facts of this case are widely different from the case of a person residing in a building and renting a portion or portions of it to roomers or lodgers.

3. Objection is made to the creditors being heard in this matter before they shall have proved their debts. It might be said that the petitioner himself, having put their names in his list of creditors, is estopped from making the objection; but it is enough to say that the matter was heard in the Court below without this objection being made, and it is too late to make it here for the first time.

4. The existence of a mortgage on the premises in this case is no element in the ascertainment of the property to be set apart as a homestead or of its value.

Order reversed, and cause remanded for proceedings in accordance with this opinion.

IN BANK.

[Filed December 28, 1882.]
No. 8510.

SAN FRANCISCO GASLIGHT CO., PETITIONER,
VS.

BRICKWEDEL, RESPONDENT.

CONSTITUTION—MUNICIPALITY—REVENUE—TAXES—DEBT—CONTRACT. Mandamus to compel respondent, as Auditor of the city and county of San Francisco, to audit certain demands of petitioner, for furnishing gas, etc., and enter the same in the proper book, together with the proper indorsements thereon. Respondent, among other matters, set up that petitioner was indebted for taxes. (Consolidation Act, Section 82.)

Per Ross, J., McKee and Myrick, JJ., concurring :

When the framers of the present Constitution said, as they did by Section 18 of Article XI of that instrument, that “No county, city, town, township, Board of Education or school district, shall incur any indebtedness or liability in any manner, or for any purpose, exceeding

in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose," etc., they meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, Board of Education or school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.

- Id.—Id. Whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that the limit is not exceeded.
- Id.—Id. *Thornton, J.*, concurred with Justice Ross, and added: Petitioner, though a corporation, is a "person" within the meaning of Section 82 of the Consolidation Act, which provides: "No demand upon the Treasury shall be allowed by the Auditor in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness."
- Id.—Id. A person delinquent for taxes is within the above provision of the Consolidation Act.
- Id.—Id. A taxpayer should not be allowed to have a claim against a municipal corporation satisfied when he owes to such corporation the money which goes to furnish the means of discharging his claim.
- Id.—Id. If the petitioner has any legal defense to the payment of the taxes, such defense could be made in an action for the writ of mandate.
- Id.—*McKinstry, J.*, dissenting: "Because, at the hearing, certain allegations in the answer were admitted to be true, I am of opinion—as at present advised—that the writ ought not to issue, and, therefore, dissent from the order. With reference, however, to all questions involved, I reserve to myself the benefit of any further argument on the coming in of the report of the referee appointed by the Court."

Mandamus.

Clement, Osment & Clement, for petitioner.

Cowdery and Swift, for respondent.

Ross, J., delivered the opinion of the Court:

We think it clear that when the framers of the present Constitution said, as they did by Section 18 of Article XI of that instrument, that "No county, city, town, township, Board of Education or school district, shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose," etc., they meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, Board of Education or school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in

any one year shall be paid out of the income or revenue of any future year. The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to State indebtedness saved the people of the State a vast amount of money. (*People vs. Johnson*, 6 Cal. 503; *Nougues vs. Douglass*, 7 Cal. 65.)

We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that the limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss.

From the petition and the answer before us, we are unable to ascertain the facts essential to the proper determination of the petitioner's application. The answer sets up affirmatively certain matters of fact which are by the law deemed denied by the petitioner. For the purpose of ascertaining the ultimate facts in respect to the income and revenue of the city and county for the fiscal year 1881-82, and in respect to the disposition and disbursement of that income and revenue, and in respect to petitioner's demands, we must refer the cause for proof and findings.

Ordered that the cause be and is hereby referred to Hon. J. F. Finn, Judge of the Superior Court of the City and County of San Francisco, who will, on proper notice to the respective parties, take proof and report findings of fact to this Court in accordance with the views above expressed.

We concur: Myrick, J., McKee, J.

CONCURRING OPINION.

I concur in the view taken by Justice Ross of the 12th Section of article XI of the Constitution, and desire to say what follows in addition.

The demands preferred by the petitioner in this case for which the writ of mandate is asked, amount to the sum of \$178,648.98.

It is set forth in the answer to the petition that there is due by the petitioner, the San Francisco Gaslight Company, to the Treasury of the City and County of San Francisco, the sum of \$125,465.38 for taxes, for fiscal years 1880-81 and 1881-82, no part of which has been paid—an amount, it will be seen, largely in excess of the demands of the petitioner.

It is contended on behalf of respondent that petitioner is indebted for these taxes as above stated, and as the amount of indebtedness exceeds the amount of the demands of the petitioner, the Auditor is justified in not allowing these demands; and to support this contention, we are referred to Section 82 of the Consolidation Act. By this section it is provided *inter alia* that "no demand on the Treasury shall be allowed by the Auditor in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness."

We have no doubt that the petitioner, though a corporation, is a person within the meaning of the clause above quoted. We cannot conclude that the law-makers intended to make one rule for natural persons and another for artificial persons as to the subject-matter of this clause. The word "person" here is intended to include persons both natural and artificial.

If this indebtedness for taxes brings the petitioner within the provision above quoted from the Consolidation Act, the Auditor is justified in not allowing the demands.

The question to be determined is the effect of the delinquency of a person in the payment of taxes on his right to have a claim allowed against the City and County Treasury.

It will be observed that the language quoted from the above-mentioned Section 82 is broad and general. It refers to a person "*in any manner indebted thereto*," i. e., to the City Treasury. Taxes are not debts due by contract, express or implied. Such is the remark made in the opinion in *Perry vs. Washburn* (20 Cal. 350), by Field, C. J., in relation to the proper meaning of the word "debts" in the Act of Congress passed 25th of February, 1862, commonly known as the *Legal Tender Act*. Referring to the provision in that Act, which declares that the notes issued under its authority shall

be "a legal tender in payment of all debts, public and private," the opinion proceeds: "Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor; it does not draw interest; it is not the subject of attachment, and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity and enforcement upon the individual assent of the tax-payer. It operates *in invitum*."

That a sum of money does not draw interest, is not the subject of attachment, and is not liable to set-off, does not prevent it from being a debt. At common law, debts did not draw interest, were not subject to attachment, and were not liable to set-off. There was a limited power in Courts of equity to set off or compensate one debt by another, under circumstances (see Story's Eq. Jur., Secs. 1431-2-3), but the general right of set-off was allowed by the statutes passed in the reign of George II. Interest on debts was not allowed until authorized by statutory enactment, and it is well known that attachment or garnishment grew out of a custom which prevailed in the city of London, and had no existence outside of that city until allowed by statute. The process of attachment in the various States of the Union exists by virtue of legislative acts. These qualities of a debt might by legislative action be made to apply to taxes. I know of no restriction upon the power of the Legislature which could prevent it from passing such a law. But, as is remarked in the opinion above cited, "the term debt, it is true, is popularly used in a far more comprehensive sense, as embracing not merely money due by contract, but whatever one is bound to render to another, whether from contract or the requirements of the law," and I am of the opinion that the forms of expression used in the eighty-second section above mentioned is used in the larger sense; that when the Legislature employed the words "in any manner indebted" it referred to a case of obligation to pay, however such obligation arose, whether from contract or by operation of law. Under our revenue laws the sum mentioned in the answer as due and unpaid for taxes, when paid, goes into the City Treasury, and is due to it. The view above taken is sustained by Section 3716 of the Political Code, which is as follows:

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delin-

quent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." The law here creates the personal obligation to pay, and to pay a sum certain and fixed by lawful authority. These, i. e., the personal obligation and the certainty of the sum, are the most striking characteristics of a debt. (See further on this point, *Moore vs. Patch*, 12 Cal. 270; *People vs. Seymour*, 16 *id.* 340; *Dugan vs. Baltimore*, 1 Gill and Johns, 499, and 2 Black. Com. 464-5.)

If the petitioner has any legal defense to the payment of the taxes herein referred to, such defense could be made in an action for the writ of mandate.

The legislation as interpreted above is eminently just and reasonable. A tax-payer should not be allowed to have a claim against a municipal corporation satisfied when he owes to such corporation the money which goes to furnish the means of discharging his claim.

If the facts are as set forth in the answer (and for the purposes of this opinion they must be held to be so), the Auditor is justified in withholding his allowance from the demands of the petitioner. It was within the discretion vested in him by law to refuse his *allocatur*, and it was his duty to do so.

As the case now stands, the writ should be denied. But for the purpose of bringing before the Court the question discussed in the opinion of Justice Ross, I concur in the order of reference. THORNTON, J.

DISSENTING OPINION.

Because, at the hearing, certain allegations in the answer were admitted to be true, I am of opinion—as at present advised—that the writ ought not to issue, and therefore dissent from the order. With reference, however, to all questions involved, I reserve to myself the benefit of any further argument on the coming in of the report of the referee appointed by the Court. MCKINSTRY, J.

DEPARTMENT No. 2.

[Filed December 4, 1882.]
No. 7532.

DODGE ET AL., RESPONDENTS,
VS.

RIDENOUR ET AL., APPELLANTS.

JUDGMENT—SURPRISE—INADVERTENCE. In this case *held*, the Court below should have granted the motion to set aside the judgment. The case is within Section 473 C. C. P.

Appeal from Superior Court, San Francisco.

D. L. Smoot, for appellants.

Estee & Boalt, for respondents.

By the COURT:

We think the Court below should have granted the motion to set aside the judgment. The case is within Section 473 C. C. P. The judgment and order are reversed, and the cause is remanded for further proceedings, with instructions that a new trial be granted.

DEPARTMENT No. 1.

[Filed December 28, 1882.]

No. 10,796.

EX PARTE G. L. JORDAN, ON HABEAS CORPUS.

POLICE JUDGE'S COURT—SAN FRANCISCO—CONSTITUTION. The Act creating an additional Police Judge's Court in the city and county of San Francisco, to be known as "Police Judge's Court No. 2," is constitutional. (Stats. 1881, p. 74.)

J. M. Lucas, for petitioner.

C. B. Darwin, contra.

By the COURT:

Under the Consolidation Act of the city and county of San Francisco, there is a Police Judge's Court, and a Judge thereof. March 7, 1881, the Legislature passed an Act creating an additional Police Judge's Court in the said city and county, to be known as "Police Judge's Court Number Two," (Stats. 1881, p. 74,) and declared that it "shall have concurrent jurisdiction of all preliminary examinations of persons charged with felony, and of all misdemeanors and violations of city and county ordinances, and all other offenses of which the Police Judge's Court of said city and county now has jurisdiction." The Act provided for the distribution of the business between the two Courts, and declared that "The mode of examination, trial, and procedure in the Police Judge's Court Number Two shall, in all cases, be governed by the same rules prescribed by law for other Police Courts in similar cases."

It is urged that this Act is in violation of Article IV, Section 25, Subdivisions 1, 2, 3 and 4 of the Constitution of 1879, which forbid the Legislature from passing a local or

special law regulating the jurisdiction and duties of Police Judges, for the punishment of crimes and misdemeanors, and regulating the practice of Courts of justice. We do not think the Act in question is in violation of those provisions. By Section 1 of Article VI, the judicial power is vested in certain Courts named, "and such inferior Courts as the Legislature may establish," etc. The Legislature had power to create the Court. To say that the Court thus created shall have concurrent jurisdiction with another Court already in existence, and shall be governed by the same rules prescribed by law for other Police Courts in similar cases, is in no sense local or special legislation within the meaning of the inhibitions. It is simply making applicable to the new creation that which already existed as to former tribunals. Nor is the Act in violation of Subdivisions 28 and 29 of Section 25 above named. Those subdivisions must be read in connection with Section 1 of Article VI. The view contended for by petitioner would render the latter section nugatory, for, in that case, the Legislature might create a Court, without (if such a thing be possible) a Judge or other officer, or conferring any jurisdiction upon it.

The warrant having been issued by a competent tribunal having jurisdiction of the subject-matter, and being valid on its face, the petitioner is remanded.

IN BANK.

[Filed December 22, 1882.]

No. 8345.

BARRETT, RESPONDENT, vs. SIMS, APPELLANT.

HOMESTEAD—INSOLVENCY. There is no statute of this State authorizing a sale, in insolvency proceedings, of property which has been declared a homestead.

Appeal from Superior Court, Sacramento County.

Hart and Taylor, for appellant.

Freeman & Bates, for respondent.

By the COURT:

There is no statute of this State authorizing a sale, in insolvency proceedings, of property which has been declared a homestead. Therefore the proceedings had for a sale in this case passed no title.

Judgment and order reversed.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 8632.

OCCIDENTAL B. AND L. ASSOCIATION, RESPONDENT,
VS.

J. H. SULLIVAN ET AL., APPELLANTS.

BUILDING ASSOCIATION — BY-LAWS — FINES — LOAN — MORTGAGE — INTEREST.

The action was on notes secured by mortgages and to establish a lien on certificates of stock of plaintiff held by defendants. The ninth by-law of plaintiff provided: "Every stockholder for every share of stock shall pay to the Secretary, on the second Wednesday in every month, the sum of one dollar, in gold." Another by-law, XI: "Any stockholder failing to pay his or her monthly installments or interest, shall pay a fine of ten per cent. per month upon the amount of the indebtedness. This fine shall be charged by the Secretary and collected with the delinquent's monthly dues; and in case any stockholder shall neglect or refuse to pay the monthly dues or fines for the space of six months, the Secretary shall tender to the delinquent the amount actually paid in, deducting all fines or forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of the association." It was decided by the Court below that the fine imposed for the non-payment of any monthly installment or installments (as required by the ninth by-law), "or interest," is ten per cent. upon the installment due and ten per cent. upon all interest due upon any loan which may have been made by plaintiff to the stockholder. *Held:* Even if this were assumed to be true, it would by no means follow that the failure to pay the fine could be made to constitute a term of the contract of loan, so that if, as in the case before the Court, the loan is represented by promissory note, secured by mortgage, the note or mortgage can be made to read, not only that the borrower shall pay the fines and the same be secured by the mortgage, but that a failure to pay a "fine" shall make the whole principal seem due, although the loan has not otherwise matured. The only consequence provided in By-law XI, in case a stockholder shall fail to pay (for six months) his monthly dues (installments) or fines, or interest, is that if the Secretary shall tender to the delinquent the amount actually paid in—deducting all fines and forfeitures that may be charged against him or her—from that time he or she "shall cease to be a member of the Association."

Id.—Id. By-law XI in no way affects or changes the terms of any contract of loan between the Association and a stockholder.

Id.—Id. The word "interest" as used in the by-law does not refer to interest due upon any loan from the corporation to a stockholder.

Id.—PENALTY. Penalties and forfeitures are not to be favored: they must be created by unambiguous language.

Appeal from Superior Court, Sacramento County.

J. H. McKune, for appellants.

Freeman & Bates, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Plaintiff's By-law IX provides: "Every stockholder for every share of stock shall pay to the Secretary, on the second Wednesday in every month, the sum of \$1, in gold." And By-law XI: "Any stockholder failing to pay his or her monthly installments or interest shall pay a fine of ten per cent. per month upon the amount of the indebtedness. This fine shall be charged by the Secretary and collected with the delinquent's monthly dues; and in case any stockholder shall neglect or refuse to pay the monthly dues or fines for the space of six months, the Secretary shall tender to the delinquent the amount actually paid in, deducting all fines and forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of the Association."

It was held by the Court below that the fine imposed for the non-payment of any monthly installment or installments (as required by the ninth by-law), "or interest," is ten per cent. upon the installment due and ten per cent. upon all interest due, upon any loan which may have been made by plaintiff to the stockholder. Even if this were assumed to be true, it would by no means follow that the failure to pay the fine could be made to constitute a term of the contract of loan, so that if, as in the case before us, the loan is represented by promissory note, secured by mortgage, the note or mortgage can be made to *read*, not only that the borrower shall pay the fines and the same be secured by the mortgage, but that a failure to pay a "fine" shall make the whole principal sum due, although the loan has not otherwise matured. The only consequence provided in By-law XI, in case a stockholder shall fail to pay (for six months) his monthly dues (installments) or *fines*, or interest, is that, if the Secretary shall tender to the delinquent the amount actually paid in—deducting all fines and forfeitures that may be charged against him or her—from that time he or she "*shall cease to be a member of the Association.*"

By-law XI in no way affects or changes the terms of any contract of loan between the Association and a stockholder.

We are convinced, however, that the word "interest," as used in the by-law, does not refer to interest due upon any loan from the corporation to a stockholder. Penalties and forfeitures are not to be favored; they must be created by unambiguous language.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed January 2, 1883.]

No. 7878.

MARTIN

VS.

THOMPSON, DEFENDANT AND RESPONDENT (WATERMAN,
INTERVENOR AND APPELLANT).

INTERVENTION — MORTGAGE — ACTION — BOND — PERSONAL PROPERTY. A mortgagee of personal property, entitled by the terms of his mortgage to the immediate possession, can intervene in an action brought by a third person against the mortgagor for the specific property, where the plaintiff has taken possession at the commencement of the action, upon giving bond as provided by the statute.

Appeal from Superior Court, San Francisco.

Curtis H. Lindley, for appellant.*M. Mullany*, for respondent.

By the COURT:

The question here to be determined is whether a mortgagee of personal property, entitled by the terms of his mortgage to the immediate possession, can intervene in an action brought by a third person against the mortgagor for the specific property, where the plaintiff has taken possession at the commencement of the action, upon giving bond as provided by the statute.

As between plaintiff and defendant the present is like the case *Martin vs. Thompson* (No. 7556).

It seems to have been held by the Court below that intervenor's lien and right of possession was lost when he filed his petition, because prior to that date *plaintiff* had removed the grain from the mortgagor's farm. But the chapter of the Civil Code which treats of mortgages of personal property (Secs. 2955-2972), substitutes the record of the mortgage for the actual delivery and continued change of possession in case of other transfers required by Section 3440. The purpose of the actual delivery, in the one case, and of the record or registry in the other, is to give notice to those who shall deal with the vendor or mortgagor, and Section 2972 only provides that the lien of a mortgage on a growing crop shall cease when the crop is removed from the premises of the mortgagor—as against *creditors* or innocent *purchasers* from the mortgagor. There is nothing in the letter of the Code which demands such construction of Section 2972 as that the lien shall be lost as a consequence of the tortuous removal of the crop by a third person.

When the crop was removed by plaintiff, intervenor was entitled to its immediate possession. True, defendant was in the actual possession, and was authorized to recover the property as against a trespasser who should remove it. While either the mortgagee entitled to the immediate possession, or the mortgagor in actual possession, would have been entitled to bring an action of trespass (or trover, or our statutory action) against one wrongfully interfering with the property, a recovery by one would be a bar to an action by the other. So here the defendant and intervenor cannot *both* take judgment against the plaintiff for a recovery of the property or its value. In this form of action all parties are actors seeking affirmative relief. Who should have the property in dispute, or its value? The defendant is entitled to recover it from the plaintiff, but the intervenor is entitled to it both as against the plaintiff and defendant. It is a proper case for intervention. (C. C. P., 387.)

Judgment reversed and cause remanded for a new trial, with direction to the Court below to allow such amendments to the pleadings, properly applied for, as may be just and proper.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8450.

HOLLISTER, APPELLANT,

VS.

SHERMAN, TAX COLLECTOR, ETC., RESPONDENT.

MORTGAGE—UNIVERSITY—REGENTS—TAXATION. Mortgages held by the Regents of the University are not taxable.

Id.—TAX DEED—CLOUD ON TITLE—INJUNCTION. In this case *held*, plaintiff not entitled to an injunction against the Tax Collector. As the mortgage was assessed to the Regents of the University, the tax deed would show the assessment was void. The deed would cast no cloud upon plaintiff's title, since, in an action brought upon it by the purchaser, the present plaintiff would not be called upon to introduce any evidence, but the purchaser must fail on his own showing.

Appeal from Superior Court, Santa Barbara County.

Huse and Mhoon, for appellant.

Stratton and Kincaid, for respondent.

By the COURT:

We can see no difference as to ownership between property taken by the Regents of the University "by grant, gift, devise or bequest" (Political Code, 1415, Subd. 7), and other

property administered by them. If any, all such property is exempt from taxation. The mortgage to secure the money loaned by the Regents to plaintiff was not, therefore, subject to taxation. As the mortgage was assessed to the Regents of the University, the tax deed would show the assessment was void. The deed would cast no cloud upon plaintiff's title, since in an action brought upon it by the purchaser, the present plaintiff would not be called upon to introduce any evidence, but the purchaser must fail on his own showing. (*Grimm vs. O'Connell*, 54 Cal. 521.)

Judgment and orders affirmed.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 7456.

CERKEL, APPELLANT,

VS.

WATERMAN ET AL., RESPONDENTS.

CONVERSION—WHEAT—BARLEY. In this case *held*, there was no ground for the defendants' supposition that the *wheat* in question, of which they were charged with conversion, belonged to their consignor. They were receiving *barley*, not wheat from him. *Further*, such supposition, if well founded, would not have exempted them from liability for selling the plaintiff's wheat and paying its proceeds to another.

Appeal from Nineteenth District Court, San Francisco.

W. Van Dyke, for appellant.

Sharp & Sharp, for respondents.

Ross, J., delivered the opinion of the Court:

The findings we think too favorable to the defendants in view of the evidence. Nevertheless, as, in our opinion, upon the facts as found, the plaintiff is entitled to judgment, we will, in view of the nature of the case, not order a new trial, but direct judgment to be entered in his favor upon the findings as they are.

Briefly, the action is for a conversion of 272 sacks of wheat. According to the findings the plaintiff purchased of one Whitman 1,272 sacks of wheat. The wheat was in the possession of Brown & Son, who were warehousemen at Browns' Landing, in Solano County, to be shipped to San Francisco on plaintiff's account. Brown & Son shipped 1,000 sacks of wheat for the plaintiff by a vessel commanded by Captain Westfall, consigned to Starr & Co., San Francisco. During the same time the defendants, who were commission mer-

chants for the sale of grain in San Francisco, were receiving barley from the same landing, from one Williams, through Brown & Son, for sale on commission, by means of a schooner commanded by Captain Espenosa. After the shipment of the 1,000 sacks by Westfall's vessel, there remained at the landing 272 sacks of the wheat belonging to the plaintiff. At the time of the departure of Westfall's boat, the schooner in charge of Espenosa was at the landing and was partly loaded with barley for the defendants. Brown & Son put the 272 sacks of wheat belonging to plaintiff on Espenosa's boat and took a receipt from him for the wheat "to be delivered in San Francisco"—the Captain, as was the custom, keeping a duplicate. Espenosa did not know to whom the wheat belonged, and delivered it to the defendants, who, supposing it belonged to Williams, sold it, as also the barley, and accounted to Williams for the proceeds, before they knew that the wheat belonged to the plaintiff.

There was no ground for the defendants' supposition that the wheat belonged to Williams. They were receiving *barley*, not wheat, from him. But it is clear that such supposition, if well founded, would not have exempted them from liability for selling the plaintiff's wheat and paying its proceeds to another.

Judgment and order reversed, and cause remanded to the Court below, with directions to enter judgment on the findings in favor of the plaintiff, and against the defendants, in accordance with the prayer of the complaint.

We concur: McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed December 22, 1882.]

No. 7555.

MARTIN, APPELLANT, vs. DURAND ET AL., RESPONDENTS.

CASE FOLLOWED—ACTION—CROP—ADVERSE POSSESSION. On the authority of *Martin vs. Thompson*, 7556, (December 20, 1882,) judgment and order affirmed.

Appeal from Superior Court, San Francisco.

L. Aldrich, for appellant.

M. Mullany, for respondents.

By the COURT:

On the authority of *Martin vs. Thompson*, No. 7556, filed December 20, 1882, judgment and order affirmed.

IN BANK.

[Filed December 13, 1882.]

No. 6920.

HAYWARD, RESPONDENT, VS. ROGERS, APPELLANT.

ASSUMPT—SHARES OF STOCK—ACCOUNTING—EVIDENCE. Action to recover a balance alleged to be due on a note, and for moneys laid out and advanced for the benefit of defendant. Answer alleging payment by means of a sale by plaintiff of shares of stock of defendant, held as security, leaving a balance due to defendant, and cross-complaint therefor.

Rogers, defendant, contended that Hayward, plaintiff, held a certain number of shares of Savage mining stock, as security for money advanced by him to Rogers, and that Hayward, without his knowledge, sold said shares of stock; that afterward, and while he was ignorant of said sale, Hayward procured a power of attorney from him to sell said stock, and then sold of the stock of the same mining company the same number of shares that he, Hayward, had held prior to said first sale as security for his said advances; that Hayward accounted to him for the sum realized on the sale of the stock last sold only, which was much less than the sum realized on the sale of the stock first sold, which Rogers contended was the stock which Hayward held as security for his advances. Plaintiff contended that he constantly held the identical stock certificates which he took as security, from the time when he received them up to the time when he sold them, or that if he did not, during all such time, have said identical stock certificates in his possession, that he did during all of such time have other stock certificates of the same mining company for the same number of shares, which, during all of such time he was able, ready and willing to deliver to defendant upon his paying the sum for which said certificates were held as security. *Held*, taking defendant's version of the transaction [recited in the opinion] as correct, and the fact that it is not charged in the cross-complaint that he was induced to do what he did by reason of any representations of plaintiff as to the condition of the mine, or the then present or prospective value of the stock, or in regard to the quantity of it which other persons were selling, the Court did not err in sustaining objections of plaintiff to the introduction of evidence of what plaintiff said to defendant in regard to those subjects. *Further*, the Court did not err in allowing the witness Peart (business manager of plaintiff) to be asked how much stock Hayward carried for Rogers between certain dates. Peart was better qualified to answer that question than any other witness, including Hayward himself. *Further*, as to this question: Appellant's counsel seems to have assumed in objecting that the answer of the witness would contradict all the evidence to which the objection referred. But, as the trial Court could not have anticipated the answer of the witness, there was no error in overruling the objection to the question. No motion was made to strike the answer out; and, according to the evidence, there is no such contradiction.

IN.—IN. The evidence as to the number of shares of stock that Hayward was carrying for persons other than Rogers, and as to the contents of the letter which Rogers wrote to Hayward, may not have been relevant to any issue in the case, but if error there was in overruling the objections to it, it was error without injury.

1D.—INSTRUCTIONS. The Court instructed the jury to the effect that if Hayward had sold the shares before the execution of the power, and had been ready, able and willing to transfer to Rogers an equivalent number of similar shares in the same company by a valid certificate, in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says he was selling his own stock, provided he was all the time able, ready and willing to respond to Rogers, in case he should come and demand his stock. If they found that Hayward had sold the identical shares, and he was not at the time of such sale able, willing and ready to deliver to Rogers a similar number of shares, in that case the suppression of those facts operated as a fraud upon Rogers, and destroyed the force and effect of the power of attorney, there being nothing for the power to operate upon. *Held*, a correct exposition of the law, and obviated the necessity of further instructions upon the issue. Therefore the refusal of the Court to give instructions on the points covered by the instruction given, is not a ground for reversal of the judgment.

1D.—1D. The following instruction held correct, but unnecessary: "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted and the character of the witnesses is good, and the story is probable."

1D — VERDICT—JUDGMENT. The jury found for plaintiff in the sum of \$295,345.38, but judgment was entered for \$305,050.95. *Held*, the judgment should be modified so as to correspond with the verdict.

Appeal from Nineteenth District Court, San Francisco.

Benham, McClure, and Moore, for appellant.

Estee & Boalt, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The principal contention on behalf of Rogers is that Hayward held a certain number of shares of mining stock as security for money advanced by him to Rogers, and that Hayward, without the knowledge of Rogers, sold said shares of stock, and afterward, and while Rogers was uninformed and ignorant of said sale, Hayward procured a power from Rogers to sell said stock, and then sold of the stock of the same mining company the same number of shares that he, Hayward, had held prior to said first sale as security for his said advances to Rogers, and that Hayward accounted to Rogers for the sum realized on the sale of the last stock sold only, which was much less than the sum realized on the sale of the stock first sold, which Rogers contends was the stock which Hayward held as security for his said advances.

On the other side, it is claimed that Hayward constantly held the identical stock certificates which he took as such security from the time when he received them up to the time when he admits that he sold them, or that if he did not during

all of such time have said identical stock certificates in his possession, that he did during all of such time have other stock certificates of the same mining company for the same number of shares, which, during all of such time, he was able, ready and willing to deliver to Rogers, upon his paying the sum for which said certificates were held as security.

It is to the admission and rejection of evidence, and to the giving and refusing of instructions upon this issue, that most of the exceptions are directed.

The transaction out of which this litigation arose, as narrated by Rogers in his testimony, was as follows:

"I went to Mr. Hayward and found him alone in his front office. I said to Mr. Hayward that I had 210 shares of Savage coming in on Monday—that is, it was due Monday—we speak of it as coming in, and I was afraid I would not be able to take care of it, and would sell the stock. * * * I told him that I thought that perhaps rather than see that amount of stock thrown on the market, he might assist me in taking care of it. He asked me at what prices the stock was coming in at. I told him, and he said: 'Send it to me.' That is the 270 shares. * * * Then upon his saying: 'Send it to me,' he says: 'By the way, what has become of that 200 shares Burling was carrying for you?' I says: 'Burling is still carrying it.' He says: 'Order that up and send it to me.' I told him I would do so. That was the end of the conversation. There may have been something said about interest—probably was.

"Q.—Was anything said as to Mr. Hayward's power or authority to sell it? A.—Not a word.

"Q.—What was done in consequence of that arrangement, if anything? A.—The stock was delivered to Mr. Hayward, and he paid the money that was spoken of, about \$186,000, that he advanced to these different parties for this stock."

In considering the exceptions upon which the appellant relies we shall assume, as indeed we must, that this is the correct version of that transaction. And in view of that, and the further fact that it is not charged in the cross-complaint of Rogers that he was induced to do what he did by reason of any representations of Hayward as to the condition of the mine, or the then present or prospective value of the stock, or in regard to the quantity of it which Woods & Freeborn, or any other person or persons were selling, we do not think that the Court erred in sustaining the objections of respondent to the introduction of evidence of what Hayward said to Rogers in regard to those subjects.

Nor do we think that the Court erred in allowing the witness Peart to be asked how much stock Hayward carried for Rogers, from April 22, 1872, to November, 1872. According to the testimony of a majority of the witnesses, Peart was better qualified to answer that question than any other witness, including Hayward himself. When this question was asked, appellant's counsel said: "I understand that question to be an offer to contradict their own witness, to contradict Mr. Hayward's books, and Mr. Peart himself. I object to it as incompetent." Appellant's counsel seemed to have assumed that the answer of the witness would contradict all the evidence to which the objection referred. But we are unable to see how the Court could have anticipated the answer of the witness, and if it could not, there was no error in overruling the objection. After the witness had answered the question, no motion was made to strike the answer out, and the Court, therefore, had no opportunity, after being sufficiently advised, to decide whether or not the witness had contradicted the evidence referred to. And according to our understanding of the evidence, there is no such contradiction.

The evidence as to the number of shares of stock that Hayward was carrying for persons other than Rogers, and as to the contents of the letter which Rogers wrote to Hayward, may not have been relevant to any issue in the case, but as we cannot conceive how the appellant could possibly be prejudiced by it, the error, if error there was in overruling the objections to it, must be disregarded.

Upon the main issue in the case the Court charged the jury as follows:

"If you find that Hayward had sold the 690 shares before the execution of the power—that, you remember, was July 13th—and had been ready, able and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate, then and in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says that he was selling his own stock, and not Rogers' stock, provided he was all the time able, ready and willing to respond to Rogers, in case he should come and demand his stock. And if you find that Hayward had sold the identical 690 shares, and that he was not at the time of such sale able, willing and ready to deliver to Rogers a similar number

of shares, then, and in that case, the suppression of those facts operated as a fraud upon Rogers, and destroyed the force and effect of the power of attorney, there being nothing for the power to operate upon."

This, in our opinion, was a correct and sufficiently clear exposition of the law applicable to that issue, and it obviated the necessity of the Court's giving any other or further instructions upon it. Therefore the refusal of the Court to give the instructions asked on the points covered by the instruction given is not a sufficient ground for reversing the judgment.

The charge of the Court as to what would constitute a bar to Rogers' right of action against Hayward appears to us to be substantially correct.

Another portion of the charge to which exception was taken reads as follows: "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted, and the character of the witness is good, and the story is probable."

There ought to be no necessity for giving such an instruction to a jury. A juror who required to be so instructed would be utterly unfit for the position. But as a matter of law we think the instruction was correct, and, so far as we can see, it was as favorable to one side as it was to the other.

We do not think that the judgment should be reversed; but it must be modified. The jury found for the plaintiff in the sum of \$295,345.38 and the judgment was entered for the sum of \$305,050.95.

It is therefore ordered that this cause be remanded to the Court below, with directions to so modify the judgment as to make it correspond with the verdict of the jury; and, when so modified, it is hereby affirmed.

We concur: McKee, J., McKinstry, J., Morrison, C. J.

CONCURRING OPINION.

The plaintiff was justified in acting in accordance with the views expressed by this Court in the case of *Atkins vs. Gamble*, 42 Cal. 86. It matters not whether those views accord with our own notions as to what the law ought to be. That case was the law when the transactions in question occurred, and has remained so ever since. Whatever certificates of stock the plaintiff sold, of those received by him on account of the defendant, were replaced by him with

like certificates prior to the execution of the power of attorney from defendant to plaintiff. At the time the power of attorney was drawn the defendant was present with the plaintiff's agent, the certificates of stock were produced, and from them the attorney obtained the number of the certificates and the number of shares, and drew a power of attorney, which the defendant executed, authorizing the plaintiff to sell them, and this he did.

I concur: Ross, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 7309.

MARTIN, RESPONDENT, VS. DURAND ET AL., APPELLANTS.

LAND LAW—BOOTH ACT. A State selection, made in lieu of a sixteenth or thirty-sixth section, and which had been certified over to the State prior to the passage of the Act of Congress of March 1, 1877, commonly known as the Booth Act, was confirmed by that Act, when the land in lieu of which the selection was made was, at the time of the selection, included within the final survey of a Mexican grant, and when the land selected was at the same time included within the claimed limits of a Mexican grant, although finally excluded therefrom. (19 U. S. Stats., 268.)

1D.—EJECTMENT—DAMAGES—APPEAL. In addition to judgment for restitution of the premises sued for, the Court below gave the plaintiff judgment against defendants for \$454.83 as damages for their detention, and it was claimed on the part of appellants that in this there was error: *first*, because there was no sufficient averment of damage, and, *secondly*, because the plaintiff could not recover against the defendants jointly upon the facts of the case. *Held:* To the first of these objections it was sufficient to say that there was a general averment of and prayer for \$2,000 damages by reason of the alleged unlawful withholding of the property, which, at least in the absence of a special demurrer to the pleading or objection to the evidence of damage, was sufficient. The waiver alluded to by counsel, only extended to such damage as accrued prior to November 1, 1878. (Finding 22.) The Court below found the value of the use and occupation of the premises sued for, subsequent to that date, to be the sum stated, for which plaintiff was awarded judgment. That finding was not questioned in the Court below, and cannot be here; and if the value of the use and occupation of the premises by defendant constituted the damage, or a part of the damage sustained by the plaintiff by reason of the unlawful detention, then the judgment for the sum mentioned was right; and of that there can be no doubt.

Appeal from Superior Court, San Francisco.

M. Mullany, for appellants.

L. Aldrich, for respondent.

Ross, J., delivered the opinion of the Court:

Upon the question of *title* the inquiry to be made is: Was a State selection made in lieu of a sixteenth or a thirty-sixth section, and which had been certified over to the State prior to the passage of the Act of Congress of March 1, 1877, commonly known as the Booth Act, confirmed by that Act, when the land in lieu of which the selection was made was, at the time of the selection, included within the final survey of a Mexican grant, and when the land selected was at the same time included within the claimed limits of a Mexican grant, although finally excluded therefrom? We answer, Yes, by virtue of the second section of the Act of March 1, 1877.

As is well known, the sixteenth and thirty-sixth sections of land in each township in California were granted to the State for school purposes, by the Act of Congress of March 2, 1853 (10 U. S. Stats., 244). By the seventh section of that Act indemnity was provided for such sections, or parts thereof, as might be lost to the State by reason of settlement at the time of survey, or because of reservation for public uses, or of being taken by private claims. Experience showed that many of the sections granted by the Act of 1853 were situated within the claimed limits of private grants made by the Mexican Government. From the nature and number of these grants and of the proceedings required for their adjudication and the final determination of their boundaries, proceedings to that end, in most cases, were slow. The State proceeded to make many indemnity selections before it was definitely known whether the lands in lieu of which the selections were made had in fact been lost to the State. These selections were invalid, some for one reason and some for another. Nevertheless, through mistake or inadvertence, they were certified to the State by the Land Department of the General Government. Of course, disputes in regard to the titles to such lands were natural and frequent. To solve the difficulty Congress interposed and passed the Act of March 1, 1877. It is entitled "An Act Relating to Indemnity School Selections in the State of California," and confirms by its first section, to the State, the title to the lands certified to it, known as school selections, which were selected in lieu of sixteenth and thirty-sixth sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by the State.

This section, it is apparent, does not cover the case under consideration. But Congress further provided, in the second section of the Act, "that where indemnity school selections have been made and certified to said State, and said selec-

tions shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *provided*, that if there be no such sixteenth or thirty-sixth section, and if the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper Land Office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person; *provided*, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States." (19 U. S. Stats., 268.)

By this section Congress confirmed such indemnity school selections as had been made and certified to the State, and which would fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, "*or are otherwise defective and invalid.*"

At the same time provision was made that such confirmation should not apply to mineral lands, etc., nor extend to lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws; *provided*, that such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of the land to the State by the Department of the Interior; and *provided*, further, that the claim of such settler be presented to the Register and Receiver of the District Land Office, together with proper proof, etc., within a certain time.

As the facts of the case before us do not bring the defendants within any of the exceptions contained in the Act, nothing further need be said in regard to them.

Clearly, such selections as had been made and certified in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of the selection by the State, were confirmed; for such is the clear and unequivocal language of the first section of the Act of Congress. Clearly, also, such selections as had been made and certified to the State, which should

fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, were confirmed; for such is the clear and unequivocal language of the second section of the Act. Equally clear and unequivocal is the language of Section 2, in which are confirmed such selections as were made and certified to the State, and which would fail by reason of *other* defects or invalidities than those previously enumerated. One such invalidity existed in the case under consideration, to wit: the selection of land at the time within the claimed limits of a Mexican grant, but which was finally excluded therefrom. Such defects clearly come within the letter as well as the intent of the statute, which is a curative Act, designed to quiet the possession and confirm the claim of those who in good faith purchased from the State, thinking they thereby got a title, but who in law did not, and which, upon well-settled principles, should be liberally construed.

In addition to judgment for the restitution of the premises sued for, the Court below gave the plaintiff judgment against the defendants for \$454.83 damages for their detention; and it is claimed on the part of the appellants that in this there was error: *first*, because there was no sufficient averment of damage, and, *secondly*, because the plaintiff could not recover against the defendants jointly upon the facts of the case.

To the first of these objections it is sufficient to say that there was a general averment of, and prayer for, \$2,000 damages by reason of the alleged unlawful withholding of the property, which—at least in the absence of a special demurrer to the pleading or objection to the evidence of damage—was sufficient. (*Dimick vs. Campbell*, 31 Cal. 240.)

The waiver alluded to by counsel, only extended to such damages as accrued prior to November 1, 1878. (Finding 22.)

The Court below found the value of the use and occupation of the premises sued for, subsequent to that date, to be the sum stated, for which plaintiff was awarded judgment. That finding was not questioned in the Court below, and cannot be here; and if the value of the use and occupation of the premises by defendants constituted the damage or a part of the damage sustained by the plaintiff by reason of the unlawful detention, then the judgment for the sum mentioned was right; and of that there there can be no doubt. (*Miller vs. Myers*, 46 Cal. 535).

Judgment and order affirmed.

We concur: McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8371.

ESTATE OF BURTON.

PROBATE COURT—PRACTICE—FINDINGS. The rules of pleading and practice in civil cases are applicable to proceedings in the Probate Courts. Issues joined in such proceedings are to be tried and determined as in civil cases. Upon trial by such Courts, without a jury, parties are entitled to findings, unless waived.

ID.—HOMESTEAD — WIDOW — TITLE — ORDER — ESTATE—INVENTORY. Upon the admitted facts of the petition, petitioner, a widow, was entitled to have a homestead set apart for the use of the family of her deceased husband out of the real property inventoried and appraised to his estate, without reference to its title.

ID.—ID. Neither the inventory of the ranch in question as property of the estate, nor the withdrawal of a portion of it from the estate for a homestead, would affect or adjudicate the question of title as between parties claiming title to the ranch itself.

ID.—ID. A probate homestead is not an estate either at law or in equity. Any question as to the title of the property, out of which the homestead may be set apart, must be tried and determined in another forum.

Appeal from Superior Court, San Diego County.

Hydenfeldt, Hotchkiss and Brunson, for appellant.

Leach & Parker, for respondents.

McKEE, J., delivered the opinion of the Court:

Maria H. Burton, widow of H. S. Burton, deceased, petitioned the Probate Court of San Diego County, in which administration of the estate of the decedent was pending, for a homestead to be set apart for the use of the family of the deceased, out of the Jamul Ranch, in that county, on which she resided with her children since the death of her husband. The ranch had been inventoried and appraised as part of the estate of the deceased.

Appraisers, who had been appointed by the Court for that purpose, filed their report that they had set apart, out of the ranch, a homestead, by metes and bounds, including the family residence, for the use of the family of the deceased. But, on the filing of the report, objections to its confirmation were made by one who claimed title to the ranch, on the grounds that the decedent, in his life-time, had no title or interest in the ranch; and that, after his death, the United States had, by patent, granted to the widow and her children, from whom the contestant had, by mortgage, foreclosure, sale and deed, obtained the title. The Court heard and sustained

the objections, set aside the report of the appraisers, refused to set apart a homestead, and dismissed the petition of the widow. Upon the announcement of the determination, counsel for the petitioner requested findings, but none were made and filed, and from the orders refusing to set apart the homestead, and denying a motion for a new trial, the petitioner appeals.

We think the petitioner was entitled to findings. The rules of pleading and practice in civil cases are applicable to proceedings in the Probate Courts. Issues joined in such proceedings had to be tried and determined by that Court as in civil cases (Sections 1312, 1713, 632-3-4, C. C. P.); and upon trial by the Court, without a jury, parties to the proceeding were entitled to findings, unless they were waived. (Section 634, *supra*; *Haffenegger vs. Bruce*, 54 Cal. 416.) As findings were not waived, it was error to enter a judgment without them.

Besides, upon the admitted facts of the petition, the petitioner was entitled to have a homestead set apart, for the use of the family of the deceased, out of the real property inventoried and appraised to the estate without reference to its title. It may be that the decedent, in his life-time, had not the true title to the ranch; yet he had had, until his death, as appears by the record, the actual possession, use and enjoyment of it, under color of title. During his life-time he had not made and recorded a declaration of homestead upon it. After his death it was inventoried and appraised as a part of his estate, and as he left surviving him his widow and children, who resided on the ranch, it was the duty of the Court, under Section 1405 C. C. P., to set apart out of it a homestead for their use. (*Ballentine's Estate*, 45 Cal. 696; *Estate of Wixon*, 36 *id.* 324; *Estate of McCauley*, 50 *id.* 544.) That duty was imperative upon the facts stated in the petition. Performance of it would not change the property itself nor affect the true title to it. In exercising its jurisdiction over the property for the purpose of the law, the Court would deal with it only as an asset of the estate. Being inventoried and appraised as such, the property was subject to the jurisdiction of the Court in the administration of the estate; and in setting apart a portion of it for a homestead for the widow and children of the deceased, it would simply withdraw such portion from the other assets as exempt by law from the claims of creditors. (*Rich vs. Tubbs*, 41 Cal. 434; *Schadt vs. Heppe*, 45 *id.* 434.) But neither the inventory of the ranch as property of the estate, nor the withdrawal of a portion of it from the estate for a homestead, would affect

or adjudicate the question of title as between parties claiming title to the ranch itself. As has been said in the estate of Moore (57 Cal. 437), a probate homestead is not an estate, either at law or in equity; any question, therefore, as to the title of the property, out of which the homestead may be set apart, must be tried and determined in another forum. (Estate of James, 23 Cal. 417; Estate of Orr, 29 *id.* 101; Estate of Delaney, 37 *id.* 176.)

Judgment and order reversed, and cause remanded for further proceedings.

We concur: McKinstry, J., Ross, J.

Abstracts of Recent Decisions.

HEIRS—NECESSARY PARTIES IN FORECLOSURE—PROPER MODE OF APPOINTMENT OF GUARDIAN AD LITEM. Bill filed to foreclose a mortgage executed by Gideon J. Pillow. Mrs. Pillow, the widow and administratrix, appeared and filed a cross-bill. Fourteen others are named as defendants, but the bill does not disclose their interest in the premises. The warning order, granted as to the non-resident defendants, is not shown to have been properly published. A guardian *ad litem* was appointed as to three of the defendants, minor children of Mrs. Pillow. *Held*: The Court cannot appoint a guardian *ad litem* before service of the summons. The heirs of Pillow, the mortgagor, are necessary parties to a bill to foreclose. (*Sentelle vs. Pillow*, Sup. Court Ark., 2 Am. Law Mag. 37.)

FELLOW-SERVANTS. A switchman on a train is not a fellow-servant of a section foreman, so as to exempt the company from liability for an injury to the former caused by the negligence of the latter. (*Hall vs. Missouri Pacific Ry.*, Sup. Ct. Mo., 8 Am. and Eng. Railroad Cases, 108.) A car inspector is not the fellow-servant, in common employment, of a brakeman, in any such sense as to relieve the railroad company from liability for injury to the latter, consequent upon the defective condition of a car which the former had failed to note. (*King vs. Ohio Ry.*, U. S. C. C., Dist. of Ind., 8 Am. and Eng. Railroad Cases, 119. When servants are of the *same department of service*, and one has *authority to control* the action of the other, the company will be responsible for the *gross negligence* of the servant *superior in authority*; and when the servants are *not engaged in the same department*, but in the *same common employment*, the company is liable for their *ordinary neglect*. *McLeod vs. Ginther's Admr.*, Court Appeals Ky., 8 Am. and Eng. Railroad Cases, 166. (See extensive notes of this case.)

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Current Topics.

JURY TRIAL BY AGREEMENT IN CIVIL CASES.

In a recent excellent address before the Law School of the University of Pennsylvania, the Hon. Craig Biddle, speaking of the constitutional privilege in that State of dispensing with jury trial by agreement in civil cases, remarked: "The Legislature, on the 22d of April, 1874, passed the Act necessary to give this provision effect. That is now over eight years ago, and the total number of agreements filed since that time, in all the Courts of this county, does not exceed twenty. If we exclude equity cases, mechanics' liens, judgment notes and divorce cases, there will probably be an average of about eight thousand cases a year to which this system would be applicable; so that in about sixty-four thousand cases, the litigants in twenty have availed themselves of this constitutional privilege. May we not say, then, that our people have thus indorsed, without qualification, the declaration of their fathers, as expressed in the Constitution of 1790, 'that trial by jury shall be as heretofore, and the right thereof remain inviolate'? Like the nobles of England in the reign of Henry III, when an innovation upon the common law was proposed '*una voce responderunt quod non lunt leges Angliæ mutare.*' In California they seem to have tried the experiment of dispensing with a jury, but how it has succeeded there I am not informed. In one case, which was carried up to the Supreme Court of California, and appears in their reports (*Touchard vs. Crow*, 20 Cal. 50-163), their determination to have an imaginary jury, if not a real one, is ludicrously admitted." In that case, counsel requested the Court to charge itself as a jury, and handed in certain instructions for that purpose. The Court thereupon charged itself, addressing itself as "gentlemen of the jury," and instructing itself that if they found certain facts they should decide for the plaintiff, but otherwise for the defendants, and that they were not concluded by the statement of the Court, but were at liberty to judge of the facts for themselves! So it seems that Mr. Gilbert was not so very absurd in making the Lord Chancellor in "*Iolanthe*" struggle for his own consent to marry one of the wards in chancery. This reminds us of "*The Divided Jury*" (of one) in Mr. Albert Mathews' "*Bundle of Papers.*" Mr. Biddle's statistics show that the system of jury trial is not falling into disrepute in Pennsylvania.—*Albany Law Journal.*

Supreme Court of California.

DEPARTMENT No. 1.

[Filed January 17, 1883.]

No. 8433.

BUTTE COUNTY, RESPONDENT,

VS.

BOYDSTUN ET AL., APPELLANTS.

DAMAGES—ROADS—EMINENT DOMAIN—COUNTY. A county may institute proceedings to condemn land for the purposes of a public road.

ID.—FENCES. In ascertaining the amount of damages, all the circumstances which naturally injure the property of the owner, in consequence of taking part of it for a public use, should be taken into consideration—such as depreciation in value, difficulty of access, difficulty of carrying on business, danger of fire, and increased necessary expenses in the way of building fences and the like.

ID.—FINDING. While the complaint contains a description of the location, general route and termini of the proposed road, and of the several parcels of land proposed to be taken, and the names of the owners, it contains no allegations of the right of the plaintiff to condemn, as required by Sections 1241–44 C. C. P., or of the value of the lands or of the sum of compensation to which the owners are entitled. In the absence from the complaint of any allegation of such material facts, a finding “which sustains the material allegations of the complaint” is wholly insufficient and does not respond to the issues made in the proceeding.

ID.—ID. A finding or judgment that the land sought to be condemned is necessary for the purpose of opening the road, is not a finding or judgment that it is necessary for a public use. Until there is such a finding and judgment rendered in a proper proceeding, under the Code, there can be no appropriation; and every step in the proceeding must be taken strictly according to law.

Appeal from Superior Court, Butte County.

Reardon & Freer, for appellant.

Gale & Lusk, for respondent.

McKEE, J., delivered the opinion of the Court:

This was a proceeding to condemn a strip of land belonging to the appellant for a road in the county of Butte.

Mainly, two questions have been argued and submitted for consideration, namely: 1. Whether the proceeding has been properly brought in the name of the county. 2. Whether the appellant's land has been appropriated by a proper judgment of condemnation.

A county is a public corporation, endowed with capacity to acquire real property within its limits for roads and highways, etc. (Sec. 360 C. C.) It is also an integral part of the State, and entitled, as an agent of the State, to the control and management of the roads and highways within its jurisdiction. It is therefore a person in charge of a public use, and may exercise the right of eminent domain in behalf of the use. (Sec. 1001 C. C.) But it cannot exercise the right except in the manner provided by Title VII C. C. P. Like any other condemning party, it is bound to show that the requirements of the statute which permits it to take private property for public use have been fully complied with. Hence it must, in any proceeding initiated by it for that purpose, show affirmatively that the property which it proposes to take is to be applied to a public use; that it is necessary to take it for that purpose, and that the compensation to which the owner of the property is entitled has been ascertained and assessed according to law. And each of these things must affirmatively appear in the record of the proceedings to have been found as facts by the verdict of a jury or the finding of the Court, and to have been confirmed by the judgment of the Court. (Sections 1241-51-52, *supra*.) If not so found and adjudged, the proceeding will be void. For private property cannot be taken from an owner against his consent, except for a public use, after just compensation for it has been ascertained, assessed and adjudged, and is ready to be paid. (Sec. 1253, *supra*.)

Such compensation consists of the whole value of the property to be taken and the damages which may result to the remainder of the land injuriously affected by reason of the taking, less the amount of any benefits which the proposed improvement may be to the owner. What such damages may be, will, of course, depend upon the circumstances of each case. But, under all circumstances, the owner is entitled to the fair market value of the land proposed to be taken, to be estimated at the commencement of the proceeding to condemn (Sec. 1249, *supra*); and, in addition, to the remainder of any damages for the consequential injury to the remaining portion of his land after deducting benefits.

In ascertaining the amount of such damages all the circumstances which naturally injure the property of the owner, in consequence of taking part of it for a public use, should be taken into consideration—such as depreciation in value, difficulty of access, difficulty of carrying on business, danger of fire, and increased necessary expenses in the way of building fences, and the like. Injuries, speculative and remote,

should, of course, be excluded. (Cooley's Const. Lim., 566.)

Applying these principles to the proceeding under consideration, we think the appellant was entitled to prove, as an element of damages, that the proposed taking of a portion of his land for public use would impose upon him the necessity of fencing the remaining portion of his land. If that necessity resulted from the taking, it would be an injury for which he would be entitled to damages, and the ruling of the Court in excluding the evidence was erroneous. (*Montom vs. Scott*, 1 Penn. S. C. 503; *Sacramento vs. Moffat*, 6 Cal. 74.) But the entire proceeding is insufficient for the purpose of condemnation. By the record it appears that the case was heard and determined by the Court without a jury, and the Court made and filed a finding of facts, which is not in the record. It has been stipulated, however, that the finding sustains the material allegations of the complaint, and upon it, "as conclusions of law, the Court finds: That the opening of said private road and the condemnation of said land belonging to said R. W. Boydston, and herein sought to be condemned, is absolutely necessary for the purpose of opening said road, and that said road should be laid out and opened, and said land condemned for such purpose upon the payment to said R. W. Boydston, according to law, the sum of \$150, and that each party hereto should pay his own costs. Judgment is hereby ordered accordingly."

But while the complaint contains a description of the location, general route and termini of the proposed road, and of the several parcels of land proposed to be taken, and the names of the owners, it contains no allegations of the right of the plaintiff to condemn, as required by Sections 1241-44 C. C. P., or of the value of the lands, or of the sum of the compensation to which the owners are entitled. In the absence from the complaint of any allegations of such material facts, a finding "which sustains the material allegations of the complaint" is, therefore, wholly insufficient (*Ladd vs. Meyer*, 51 Cal. 277), and does not respond to the issues made in the proceeding. There was, therefore, no finding and no judgment of a necessity to take the appellant's land for the use of the public, no finding and no judgment that the land was to be applied to a public use, and that the compensation to which the owner was entitled had been ascertained and assessed according to the requirements of the law. A finding or judgment that the land sought to be condemned is necessary for the purpose of opening the road, is not a finding or judgment that it is necessary for a public use. "A

finding," says the Supreme Court of Michigan in *Mansfield vs. Clark* (23 Mich. 519), "that the taking is needful to the proposed enterprise is not the same as a finding that it is for the use and benefit of the public. The report of the jury or commissioners must distinctly cover this point in every case; and they cannot properly make one which will warrant the taking of the land, unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance." See, also, *Renslaer vs. Davis*, 43 N. Y. 137; *Grand Rapids vs. Van Driel*, 24 Mich. 410.

Until there is such a finding and judgment rendered in a proper proceeding, under the Code, there can be no appropriation; and every step in the proceeding must be taken strictly according to law. It is well settled that whenever the property of an individual is to be divested by proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection and benefit. Those provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the property-owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance. (Cooley's Con. Lim., 528.)

Judgment and order reversed.

We concur in the judgment: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed December 29, 1882.]

No. 8572.

HAMILTON, RESPONDENT, vs. JONES ET AL., APPELLANTS.

APPEAL—ERROR. No error appearing, the judgment will be affirmed.

Appeal from Superior Court, Placer County.

Henley, Whipple & Oates, for appellant.

Hamilton and Dunlap, and *Burt and Hamilton*, for respondent.

By the COURT:

This is a proceeding to foreclose a mortgage. There was a demurrer to the complaint, which was overruled by the Court, and no answer being filed, a decree of foreclosure was entered. There is no error apparent in the case, and the judgment of the Court below is affirmed.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 7238.

ADAMS ET AL., RESPONDENTS,

VS.

DOHRMANN ET AL., APPELLANTS.

PRACTICE—STATEMENT—CERTIFICATE—NEW TRIAL—APPEAL—BILL OF EXCEPTIONS—JUDGE—IDENTIFICATION—RECORD—AMENDMENT—NOTICE. Where notice is given of a motion for a new trial, to be made on a statement of the case, it is the duty of the moving party to propose such a statement and have it settled, signed and certified by the Judge. The statement must be authenticated in that way before it can be filed with the Clerk of the Court. (Sec. 650 C. C. P.) After it has been signed, and certified, and filed, the motion upon it may then be brought to a hearing by either party; and, as the statement used on the hearing, it constitutes part of the record of the case on appeal from the order granting or denying the motion. But the signature and certificate of the Judge are indispensable. Without them there is no statutory statement on which the motion may be heard.

Id.—Id. An unauthenticated paper in the transcript, purporting to be a statement, is no part of the record on appeal, and must be disregarded.

Id.—Id. Nor can this Court return the record of a case to the Court below for the purpose of having that Court supply in a document in the transcript those things which were indispensably necessary to constitute it part of the record in the first instance. The signature and certificate of the Judge to a statement on motion for a new trial, after the motion has been heard and determined, and an appeal taken from the order, would not aid the appellant. The Code of Procedure requires that the bill be certified as allowed before filing. (Secs. 650, 660.)

Id.—Id. The appellate Court cannot make a record or supply the existence of papers which constitute part of a record on which a Court below may act; nor can it amend a record of a lower Court. That must be done in the lower Court; and after an appeal has been taken and perfected, that Court, losing, as it does, jurisdiction over the case, has no power to make another record by adding to the record already made a new statement on motion for a new trial or on appeal.

Id.—Id. There is no case in which the practice has been adopted of returning the record of a case for the purpose of supplying a bill of exceptions or statement which did not legally exist.

Appeal from Fourth District Court, San Francisco.

J. M. Burnett, for appellants.

E. S. Pillsbury, for respondents.

McKEE, J., delivered the opinion of the Court:

The appeal in hand is from the final judgment in this case, and from an order denying a motion for a new trial.

The notice of intention to move for a new trial designated that the motion would be made "on a statement of the case, and on the papers and records in the cause."

In the transcript there is a paper marked "Defendant's proposed statement on motion for a new trial and on appeal," which appears to have been filed April 10, 1880; but it was not, at any time, signed by the Judge of the Court, nor certified by him to the effect that it had been settled and allowed as was required by Section 650 C. C. P.

When notice is given of a motion for a new trial, to be made on a statement of the case, it is the duty of the moving party to propose such a statement and have it settled, signed and certified by the Judge. The statement must be authenticated in that way before it can be filed with the Clerk of the Court. (Sec. 650, *supra*.) After it has been signed, and certified, and filed, the motion upon it may then be brought to a hearing by either party; and, as the statement used on the hearing, it constitutes part of the record of the case on appeal from the order granting or denying the motion. But the signature and certificate of the Judge are indispensable. (*Schrieber vs. Whitney*, 9 Pac. C. L. J., 430; *Keller vs. Lewis*, 56 Cal. 466.) Without them there is no statutory statement on which the motion may be heard. An unauthenticated paper in the transcript, purporting to be a statement, is no part of the record on appeal, and must be disregarded. Nor can this Court return the record of a case to the Court below for the purpose of having that Court supply in a document in the transcript those things which were indispensably necessary to constitute it part of the record in the first instance.

The signature and certificate of the Judge to a statement on motion for a new trial, *after* the motion has been heard and determined, and an appeal taken from the order, would not (as Mr. Justice Myrick observed in *Keller vs. Lewis*, *supra*) aid the appellant, for the Code of Civil Procedure requires that the bill be certified as allowed "before filing." (Sec. 650 C. C. P.)

This Court cannot make a record or supply the existence of papers which constitute part of a record, on which a Court below may act. Nor can we amend a record of a lower Court—that must be done in the lower Court; and after an appeal has been taken and perfected, that Court, losing, as it does, jurisdiction over the case, has no power to make another record by adding to the record already made a new statement on motion for a new trial or on appeal.

In some instances we have sent down the record of a cause to have inserted in it some matter omitted from a bill of exceptions or statement in the transcript; but there is no case in which the practice has been adopted of returning the

record of a case for the purpose of supplying a bill of exceptions or statement which did not legally exist.

The motion made to return the record in this case for that purpose must therefore be denied; and as there is no error in the judgment-roll, the judgment and order appealed from are affirmed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8638.

SMITH, APPELLANT, vs. HILL, RESPONDENT.

UNLAWFUL DETAINER—NOTICE TO QUIT—LEASE. Three days' notice, as provided in Sections 1161 and 1162 C. C. P., is necessary, where the right of re-entry is to be exercised by a grantor or lessor. (C. C., 791.)

Appeal from Superior Court, Sacramento County.

L. S. Taylor, for appellant.

Grove L. Johnson, for respondent.

Ross, J., delivered the opinion of the Court:

The lease under which the defendant entered into the possession of the premises was from one Baker, and was "for the term of two years next ensuing from the 1st day of September, 1877, with the privilege to said defendant for an additional term of three years, to commence on the 1st day of September, 1879, at the monthly rent of \$40 per month, payable monthly in advance;" and it was provided in the lease that if Baker should sell the premises during the terms therein mentioned, the lease should thereupon terminate and the premises be at once surrendered to Baker. Defendant availed himself of the additional term stipulated for in the lease. On the 15th day of July, 1882, Baker sold and by deed conveyed the premises to the plaintiff. The rent being, according to the terms of the lease, payable monthly, in advance, it had previous to the sale been paid to Baker for the month of July, 1882. On the last day of that month Baker gave the defendant notice in writing that he had sold and conveyed the premises to the plaintiff, and demanding that defendant surrender them to the plaintiff. On the next day, August 1st, the plaintiff made a similar demand on defendant, both of which demands were refused, and the next day, August 2d, this action was commenced for the unlawful detention of the property.

The demurrer was properly sustained, for the reason that the three days' notice required by the Code was not given.

Section 791 of the Civil Code provides: "Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in Sections 1161 and 1162 Code of Civil Procedure."

Judgment affirmed.

We concur: McKinsty, J., McKee, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 7346.

PORTER, RESPONDENT, VS. HOPKINS ET AL., APPELLANTS.

INJUNCTION—COUNSEL FEES—BOND—UNDERTAKING—ATTORNEY—DAMAGES.
Reasonable and necessary counsel fees expended in obtaining a dissolution of an injunction are properly allowable as damages in a suit upon the undertaking given to secure damages to defendant by reason of issuing the writ. But an allowance for services of counsel in obtaining a final judgment, in the case that plaintiffs were not entitled to the injunction, is erroneous.

COSTS—DECISION—TIME—FILING. Section 1033 C. O. P. requires the party in whose favor judgment is rendered to file and serve a memorandum of his costs and disbursements within five days after notice of the decision of the Court, where the case is tried without a jury. The decision referred to is the finding of facts and conclusions of law signed by the Court and filed with the clerk as the basis of the judgment to be entered. (Secs. 632-33 C. O. P.) In the case in hand the memorandum was filed within five days after the filing of the "decision," and it was filed in time.

Appeal from Superior Court, San Francisco.

McElrath & Eells, for appellants.

B. S. Brooks, for respondent.

McKEE, J., delivered the opinion of the Court:

By the undertaking in suit, the defendants undertook to pay such damages as might be sustained by reason of the issuance of an injunction, if it should be finally decided by the Court that the parties in whose behalf the writ was issued were not entitled to it.

The writ was issued out of one of the late District Courts of the city and county of San Francisco, in a suit in equity, brought by Egbert Judson *et al.* against George K. Porter *et al.*, to perpetually enjoin the latter from prosecuting certain actions at law then pending, for the recovery of some real estate, which was then in controversy between the parties to the suit. It was admitted by the pleadings in the case in hand that the plaintiff Porter was the sole party interested in the prosecution of the actions enjoined; and, on the trial, the Court found that he had incurred and paid out, for the services of counsel in and about the dissolution of the injunction, the sum of \$1,000; and he had been also compelled to pay as a further counsel fee the sum of \$200 for service rendered in procuring from the Court, out of which the injunction had been issued, final judgment that the plaintiffs in the injunction suit were not entitled to the writ.

These were the only two items of damages considered and allowed by the Court, and the question arises, Are the defendants liable on their undertaking for each of these items?

Upon the final decision by the Court that the plaintiffs were not entitled to the writ of injunction, a cause of action accrued, according to the terms of the undertaking, to recover such damages as had been sustained by reason of the injunction.

Reasonable and necessary counsel fees expended in obtaining a dissolution of the injunction are properly allowable as damages in a suit upon the undertaking. (*Wilson vs. McEvoy*, 23 Cal. 172; *Prader vs. Grimm*, 28 *id.* 11.) The services, for which the plaintiff incurred and paid out \$1,000, were rendered by his counsel on two motions made to dissolve the injunction, and on appeal, from the last order refusing to dissolve it, to the Supreme Court, where the order was reversed, with direction to the lower Court to dissolve the injunction. The services upon these motions were necessary, the charge for them was reasonable, and it was paid by the plaintiff. The finding to that effect is fully sustained by the evidence, and the sum was properly allowed.

But the allowance of the additional sum of \$200 for the alleged services of counsel, in obtaining a final judgment in the case, that the plaintiffs were entitled to the injunction, was erroneous.

The record shows that after the final order for the dissolution of the injunction the case was tried on its merits, and a judgment entered for the plaintiff; but on appeal to the Supreme Court from the judgment it was reversed and the cause

remanded for a new trial. Before a new trial was had the plaintiffs declined further to prosecute the suit and moved the Court to dismiss it; that motion was resisted by defendants and the Court denied it, but the Court did discuss the action, after deciding that the injunction had been improperly issued. Resistance to the plaintiff's motion was unnecessary, because the dismissal of the action upon that motion, following the dissolution of the injunction and the decision of the case by the Supreme Court, would have been equivalent to a final decision that the plaintiff was not entitled to the injunction, even if the previous dissolution did not have that effect; and would have operated as a breach of the undertaking on injunction upon which the defendants would have become liable to respond in damages. (*Dowling vs. Polack*, 18 Cal. 626; *Leese vs. Sherwood*, 21 *id.* 164; *Fowler vs. Frisbie*, 37 *id.* 34.)

But liability could not be enforced against them for other fees or damages than the reasonable and necessary fees expended in obtaining a dissolution of the injunction. After dissolution the cause itself still existed, independent of the writ of injunction; and the expense of services rendered, after the dissolution, in the cause itself or in resisting a motion to dismiss the cause, was not damages sustained by reason of the writ. An attorney's fee for services rendered in the case, after the dissolution of the injunction, was therefore improperly allowed. (*Elder vs. Sabin*, 66 Ill. 131; *Wilson vs. Haecker*, 85 *id.* 349; *Robertson vs. Robertson*, 58 Ala. 68; *Bustamente vs. Stewart*, 55 Cal. 115.)

There was no error in refusing to strike out the memorandum of costs.

Section 1033 C. C. P. requires the party in whose favor judgment is rendered to file and serve a memorandum of his costs and disbursements within five days after notice of the decision of the Court when the case is tried without a jury.

The decision referred to is the finding of facts and conclusions of law signed by the Court and filed with the Clerk as the basis of the judgment entered. (Secs. 632-33, *supra*.) In the case in hand the memorandum was filed within five days after the filing of the "decision," and it was filed in time.

Judgment and order reversed, and cause remanded, unless the plaintiff remits \$200 of the judgment. Upon remitting that amount in the Court below the judgment as modified will stand affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8662.

HEINLEN, PETITIONER,

VS.

CROSS, JUDGE, ETC., RESPONDENT.

INJUNCTION—APPEAL—STAY OF PROCEEDINGS—MANDAMUS—BOND—CONTEMPT.

From a judgment perpetually restraining a defendant from diverting certain waters and granting damages an appeal was taken, the bond on appeal being in the sum of \$300, for costs, besides double the amount of the money judgment. *Held*, the injunction was not suspended by virtue of the appeal, and that it was the duty of the Court below to inquire into the facts concerning an alleged contempt in violating the injunction order, which duty would be enforced by mandamus.

Mandamus.*Heinlen and Soderberg*, for petitioner.*Terry*, for respondent.

Ross, J., delivered the opinion of the Court:

The present petitioner is plaintiff in a certain action which was brought in the Superior Court of Tulare County against the Fresno Canal and Irrigation Company for the recovery of damages and an injunction perpetually restraining the defendant in the action from diverting or in any manner interfering with certain waters. After trial final judgment was entered in the action in favor of the plaintiff and against the defendant for \$11,000 damages and perpetually enjoining the defendant, its agents, employees, etc., from diverting or in any manner interfering with the waters, and for costs of suit. From that judgment an appeal was taken by the defendant to this Court, the undertaking on appeal being in the sum of three hundred dollars for costs, besides double the amount of the money judgment.

An agent of the defendant having continued the diversion of the waters notwithstanding the judgment, application in proper form was made on behalf of the plaintiff to the Superior Court for an order on the said agent to show cause at a certain time and place why he should not be punished for contempt of Court in disobeying the injunction awarded by the judgment. At the time and place appointed for the purpose, the agent of the defendant in the action appeared with

his counsel, and stated to the Court that since the entry of the judgment the defendant had continued to divert the waters by the same means and to the same extent as before, but by no other means and to no greater extent, which statement being assented to by the plaintiff, the Court dismissed the proceedings and discharged the agent, on the ground that the process of contempt was a proceeding in the action, and that by the appeal all proceedings under the judgment had been stayed.

Had the action of the Court below been in the exercise of a judicial discretion, of course mandamus would not lie to compel the Court to proceed in the matter. But it is perfectly manifest that the action of the Court in dismissing the proceeding was based on a supposed want of power occasioned by the appeal and the incidental stay of proceedings wrought by the execution of the undertaking on appeal. If the injunction was not suspended by virtue of the appeal, it was the duty of the Court to have inquired into the facts, and to have brought its judgment to bear upon them. (*Merced Mining Company vs. Freemont*, 7 Cal. 130.) Did the appeal suspend the injunction?

It is claimed for the respondent that it did by virtue of Section 949 of the Code of Civil Procedure. But that section, so far as this question is concerned, is substantially the same as Section 356 of Parker's Cal. Prac. Act, which was in force when the case of the *Merced Mining Co. vs. Freemont*, *supra*, was decided, and substantially the same as Section 342 of the New York Code. (Watt's N. Y. Code, Sec. 342.)

In *Merced Mining Co. vs. Freemont* this Court held that the execution of the undertaking contemplated by Section 356 of the former Practice Act did not have the effect of suspending the injunction—the Court saying: "When a party is restrained by injunction, he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal, with an undertaking of three hundred dollars, would have the effect of staying the injunction itself, then the plaintiff would have no remedy, and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction."

As already said, the New York statute is substantially the same as ours so far as concerns the question under consideration. And in a late case in that State, reported in 71 N. Y., p. 430, the Court of Appeals said: "The order of the Judge

was in substantial compliance with the statute, and stayed 'all proceedings on the part of the plaintiff in execution of the judgment.'" But this did not affect the validity or effect of the judgment pending the appeal, so far as it bore upon and restrained the action of the defendant, its servants or agents. It did not absolve them from the duty of obedience and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as adjudged by the Court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages. The statute does not, and the Judge's order staying the plaintiff did not, and could not, derogate from the efficiency of the judgment in its operation upon, and effectually restraining, all acts by the defendant in violation of its mandate. The Court should have, and doubtless has, the power, notwithstanding an appeal, especially as long as the action is pending in the same Court upon an appeal from the Special to the General Term, to command respect for its judgments and obedience to its mandates until they are reversed.

This power is essential to the administration of justice, and to the respect which Courts of justice have a right to demand from suitors. It would seem to be preposterous that a party could, by the mere order of the Court staying his hands from executing a judgment not yet executed, be deprived of the whole fruit of the judgment by the lawless act of the defeated party pending an appeal, without remedy, that he must stand by, and without possibility of redress, see the subject-matter of the litigation destroyed, so that if he succeeds in affirming the judgment it will be a barren victory. If the respondent here is right in its contention, pending an appeal from a judgment staying waste, which if committed will destroy the freehold, the appellant in simply staying the plaintiff's proceedings on the judgment may with impunity do the very act forbidden and destroy the freehold. This would be to give the later injunction, staying action by the one party upon the judgment effect, as working a dissolution of the permanent and general injunction before granted, restraining the other party from doing any act affecting the subject of the litigation. The judgment, so far as it enjoined the defendant, needed no execution. It acted directly without process upon the defendant, and the stay only operated to prevent the collection of the costs awarded." (See, also, *Hicks vs. Michael*, 15 Cal. 107; *Oatman vs. Dixon*, 9 Cal. 23; *State vs. Chase*, 41 Ind. 356; *High on Injunctions*, 2d Ed., Sec. 1698.)

Let the peremptory writ issue.

We concur: McKinstry, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed February 1, 1883.]

No. 8411.

LAUGHLIN, APPELLANT, VS. WRIGHT ET AL., RESPONDENTS.

MORTGAGE—INTEREST—NOTE.—If it be true that the plaintiff held in his hands sufficient funds of the mortgagors with which to pay the interest on the note, and did not do so, it may be that the interest should not be compounded, but it certainly would not prevent the note from bearing simple interest according to its terms.

HOMESTEAD—HOTEL.—The contention that mortgages executed under the power of attorney in question were invalid because the premises were the homestead of defendants, *held* not well founded. True, the husband filed a declaration of homestead on the premises prior to the execution of the power of attorney, but the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it, the homestead of the declarant. The use of the property is an important element to be considered.

Id.—Id.—It appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. It was so used by them at the time of the filing of the declaration, and until August, 1874, when, because of the embarrassed condition of their business, they left the hotel and put it in other hands. The Wrights, it is true, lived in the hotel until August, 1874, but their residence there was but incidental to the business of "running the hotel." When they became embarrassed in their business they sought a residence elsewhere, and put the hotel property in charge of others; and this was prior to the execution of the power of attorney to the plaintiff.

Id.—Id.—It would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be, the place where the home is.

Appeal from Superior Court, Santa Barbara County.

Hall, Richards & Boyce, for appellant.

Williams & Williams, for respondents.

Ross, J., delivered the opinion of the Court:

The issue raised by the pleadings as to whether the promissory note, for the security of which the mortgage sought to be foreclosed was given, had been paid, was *the* issue in the case, and upon that issue there is no finding. In other respects, also, the findings do not sustain the judgment. The Court found the due execution of the note and mortgage on the 20th of November, 1875. The note was for \$1,479, payable one year after its date, with interest at the rate of one and one-half per cent. per month, payable monthly, and if not so paid, to be compounded monthly. The Court also found that the plaintiff, who was in charge of the mortgaged premises, received from the rents thereof the sum of \$3,000, out of which he paid to and on account of the mortgagors \$580.80. This, according to the findings, left of the rents in the plaintiff's hands \$2,419.20. Out of this the Court below

allowed the plaintiff the amount of the principal sum of the note—\$1,479—and gave the defendant Mary Glasgow, who was one of the mortgagors, judgment against the plaintiff for the balance of the rents, \$940.20, on a certain claim set up by her against the plaintiff.

This action on the part of the Court below could only have been based on the idea that, because the plaintiff had in his hands sufficient funds derived from the rents of the mortgaged premises with which to pay the interest on the note as it became due, the note ceased to bear interest. But clearly this was not so. If it be true that the plaintiff held in his hands sufficient funds of the mortgagors with which to pay the interest, and did not do so, it may be that the interest should not be compounded, but it certainly would not prevent the note from bearing simple interest, according to the terms. To hold that it would, would be to hold that paid which was not paid.

As the case must go back for new trial, it is proper that we should indicate our views upon another point in the case; and to do that it is necessary to go somewhat into the facts as they appear in the record:

The defendant Mary Glasgow was formerly the wife of the defendant Richard Wright, and was such at the time of the execution of the note and mortgage in suit. It was they who executed them. The mortgaged premises consist, according to the record before us, of two lots in the town of Gandaloupe, in the county of Santa Barbara, on which is erected a building called the Wright Hotel. This property was incumbered by a mortgage in favor of Schwartz & Co. for \$1,573.02; by a lien in favor of Schwartz, Hartford & Co. for \$1,100; by a lien in favor of one Douglas for \$247.50, and by a mortgage in favor of the plaintiff for \$1,200. To get rid of these incumbrances, the Wrights put the plaintiff in charge of the property, with power to rent and collect the rents, and executed to him a power of attorney appointing him their attorney in fact "to raise money on" the property "by executing our notes for such sums as to our attorney may seem proper, and on such terms, and to become payable at such time, and draw such interest, not exceeding $1\frac{1}{2}$ per cent. per month, as to our said attorney may seem proper, and by executing such mortgages to secure said notes in our names, places and stead on such real estate, and the improvements thereon or relating thereto, as to our said attorney may seem proper; the money for which said notes are drawn and which said mortgages are to secure, is to be used exclusively to pay off and settle all debts now standing

against the aforesaid property." Pursuant to this power of attorney the plaintiff borrowed of the Bank of San Luis Obispo the sum of \$2,000, for which he executed as the attorney in fact of the Wrights a promissory note, secured by a mortgage on the premises. In order to give the mortgage to the bank priority, the plaintiff released his own mortgage on the property. With the money the plaintiff thus got from the San Luis Obispo Bank, increased by advances made by himself, he paid off, at the request of the Wrights, the mortgage of Schwartz & Co., and the liens of Schwartz, Harford & Co., and of Douglas, aggregating \$2,920.52. Subsequently, to wit, on the 20th of November, 1875, the Wrights executed to the plaintiff the note and mortgage in suit for \$1,479, being the amount of the mortgage released by plaintiff in order to obtain the money from the bank, together with accumulated interest. When the mortgage executed to the bank became due, the bank demanded the money, and in order to pay it, the plaintiff borrowed, as the attorney in fact of the Wrights, of one Greening, the sum of \$2,000, executing therefor as their attorney in fact a note secured by a mortgage on the property.

The plaintiff claims that, after having paid out of the rents collected the several amounts to the Wrights and the interest on the mortgages, and the taxes and insurance on the property, there remained a balance due him, whereas the defendant Mary Glasgow, formerly Mary Wright, now asserts that the mortgages executed by the plaintiff under the power of attorney were void, on the ground that the premises constituted the homestead of herself and her former husband. It is true that the husband—the defendant Richard Wright—filed a declaration of homestead on the premises on the 25th of May, 1874, which was prior to the execution of the power of attorney. But the mere filing of a declaration of homestead does not of itself constitute the premises embraced within the homestead of the declarant. The *use* of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. It was so used by them at the time of the filing of the declaration, and until August, 1874, when, because of the embarrassed condition of their business, they left the hotel and put it in other hands. The Wrights, it is true, lived in the hotel until August, 1874, but their residence there was but incidental to the business of "running the hotel." When they became embarrassed in their business, they sought a residence elsewhere, and put

the hotel property in charge of others; and this was prior to the execution of the power of attorney to the plaintiff. It would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be, the place where the home is. On this subject, see *Ackley vs. Chamberlain*, 16 Cal. 183; *Rhodes vs. McCormick*, 4 Iowa 374; *Gregg vs. Bostwick*, 33 Cal. 228; *Maum vs. Rogers*, 35 Cal. 319.

Judgment and order reversed, and the cause remanded for a new trial.

We concur: McKee, J., McKinstrey, J.

DEPARTMENT No. 1.

[Filed February 1, 1883.]

No. 8477.

CENTRAL PACIFIC R. R. CO., RESPONDENT,

vs.

MEAD, APPELLANT.

ADVERSE POSSESSION—OFFER TO PURCHASE—STATUTE OF LIMITATIONS. The plea of defendant was the Statute of Limitations, and he relied upon adverse possession of the property for five years immediately preceding the commencement of the action as constituting a bar to the plaintiff's action. There was evidence tending to show an offer on the part of defendant to purchase the property from plaintiff within the period of five years next preceding the commencement of the action. Held, such an offer, if made, was a clear recognition of plaintiff's title, and a perfect answer to defendant's claim of adverse possession.

Appeal from Superior Court, Colusa County.

Dyas & Bridgeford, for appellant.

Goad and Albery, for respondent.

Ross, J., delivered the opinion of the Court:

The true and only paper title to the land in dispute is, and since March 17, 1875, has been, in the plaintiff, as evidenced by a United States patent of that date. The plea of the defendant was the Statute of Limitations, and he relied upon adverse possession of the property for five years immediately preceding the commencement of the action as constituting a bar to the plaintiff's action to recover it.

There was evidence given on the trial tending to show an offer on the part of defendant to purchase the property from the plaintiff within the period of five years next preceding the commencement of the action. Such an offer, if made, was a clear recognition of plaintiff's title, and a perfect answer to

the defendant's claim of adverse possession. (*Lovell vs. Frost*, 44 Cal. 474; *Tyler on Ejectment*, 921.) An offer to purchase the *property* from the party having the legal title to it does not come within the doctrine of the case of *Cannon vs. Stockman*, 36 Cal. 535, and of kindred cases.

Order affirmed.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed January 26, 1883.]

No. 8346.

LOUP ET AL., RESPONDENTS,

VS.

THE CALIFORNIA SOUTHERN R. R. CO., APPELLANT.

CONTRACT — ESTIMATES — ENGINEER — ACTION — PLEADING. — In this case the Court holds that the averment and proof of the estimates made by the engineer, as provided for in the contracts, or the averment and proof of legal cause for the nonproduction of such estimates, were essential to the vesting of a cause of action in plaintiffs.

Appeal from Superior Court, San Diego County.

Cooper and Luce, for appellant.

Chase, Arnold & Hunsaker and *Leach & Parker*, for respondents.

Per McKEE, J.:

The complaint in the case contains four counts: The first and fourth are founded upon two special contracts, the third upon a *quantum meruit*, and the second upon a cause of action in the nature of an action on the case, for alleged wrongful acts or omissions by the defendant.

There was a demurrer to the complaint, on the grounds that several causes of action had been improperly united, and that none of the counts contained facts sufficient to constitute a cause of action; but the demurrer was overruled.

Several causes of action are unitable in one complaint when they arise upon contract express or implied; and as the first, third and fourth counts arise out of the special contracts upon which the action was founded, they belong to the same class and were properly united in the complaint.

But the second count in the complaint is not founded on the contract. Its allegations are, substantially, that the defendant had, according to the terms of the contract, the right to enter at any time, by itself or its agents, upon the premises covered by the contract, and perform any work thereon;

that about the 1st of April, 1881, it elected to avail itself of the right, and after notifying the plaintiffs, entered upon the premises for the purpose of constructing some culverts on the road; that it kept and held possession of the premises for the space of three months, and "unnecessarily delayed and neglected and refused to proceed in a prompt or reasonable manner, or in a reasonable time, to construct said culverts, so as to permit the plaintiffs to do their part of the work, and thereby hindered and delayed plaintiffs in and about the doing of their work aforesaid * * * and by reason of the hinderance and delay caused by the negligent and wrongful acts and omissions of the defendant, the plaintiffs have sustained damages in the sum of one thousand dollars," for which they ask judgment.

In entering upon the premises covered by the contracts the defendant was not guilty of a breach of contract, for the right to enter was reserved by the contracts; but the charge is that the defendant, in exercising its right, "neglected and refused to proceed in a prompt or reasonable manner or in a reasonable time" to perform its work; and for these wrongful acts or omissions the plaintiffs sue. But such acts or omissions constituted a breach of duty, not of contract, out of which arose an obligation and a liability on the part of the defendant to respond to the plaintiffs in damages.

A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right, to the enjoyment of which another is entitled, or causes to such other some substantial loss of money, health or material comfort. (Underhill on Torts, 4.) So, whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there be a breach of duty in the course of the employment, the person injured by the breach may recover damages in tort. (Cooley on Torts, 91. *Courtney vs. Earl*, 10 C. B., 73.)

It therefore seems clear that the cause of action stated in the second count was founded on a neglect of duty. The plaintiffs allege that the defendant by its wrongful acts and omissions caused them injury; and the action was tried and determined as an action *ex delicto*, for the Court found that the defendant had the right, under the contract, to enter upon the premises and construct the culverts. Where a person has authority to do an act, no action will lie for doing it, unless in the performance of the act he has violated some

duty which he owed to the plaintiffs. And the Court finds that there was such a violation of duty, because, in performing the act which it had authority to perform, "the defendant did not proceed in a reasonably diligent or expeditious manner, but greatly delayed in building the culverts, and refused to proceed in a reasonably prompt or expeditious manner therewith." The defendant was therefore guilty of a wrong to the plaintiffs, which occasioned damages to them in the sum of \$1,000, and that sum the Court awarded to the plaintiffs in the general judgment on the causes of action on the contracts. Damages for breaches of contracts and for neglect of duty were thus assessed in the same case; but an action founded on neglect of duty cannot be united in the same complaint with actions founded on contracts. (*Boroman vs. Pustell*, N. Y. Supr. Ct. 1881; *Thompson vs. St. Nicholas Bank*, 61 How. 163.) The demurrer to the complaint should therefore have been sustained.

Besides, the defendant is sued as a corporation, and in the fourth count of the complaint there is no averment of the defendant's corporate existence.

It is a settled rule of pleading that each count must contain in itself facts sufficient to constitute a cause of action; it cannot be helped out by reference to other counts or parts of the complaint, for averments which are essential to it as a cause of action. (*Collins vs. Bartlett*, 44 Cal. 381; *Kretchbaum vs. Melton*, 49 *id.* 55.)

Moreover, neither the first nor fourth counts contain any sufficient averment of a breach of the covenant of the defendant to pay, which is contained in the special contracts upon which the causes of action are founded.

It appears by the contracts that Loup and Withers, the respondents, undertook to do the gradation and masonry work of some sections of the appellant's railroad, according to specifications of the work which were incorporated in the contracts, and in conformity to the plans and directions, and to the satisfaction and acceptance, of the chief engineer of the appellant. The work contracted for was to be commenced and finished within specified dates, for which the appellant agreed to pay, at prices fixed by the contracts, from time to time, "and in the manner and form provided" by the contracts. Those provisions were as follows:

"1st. Estimates of the work shall be made by and under the direction of the engineer at the close of each calendar month, or as soon thereafter as may be, of the amount and value, as near as practicable, of work done and material furnished and delivered under this contract according to the

prices named herein; and within thirty days after the rendering of such estimates the said company shall pay to the said contractor the amount of said estimates, less previous payments, and less ten (10) per cent.

"2d. Also, that the — per cent. retained from the above monthly estimates shall in no case be considered due or payable to said contractor until the work herein contracted for is fully completed, in accordance with this agreement, and said percentage may be used by the company, in case of apprehended delay, in hastening the completion of the work.

"Upon the completion of all the work herein contracted for, in the time and manner agreed upon, or as soon after said completion as may be, the engineer shall make a final estimate of all the work done, from which shall be deducted the sum of the payments theretofore made on the monthly estimates, and the residue shall be paid by said company at its office in San Diego to said contractor, upon his receipting for the same in full upon said final estimate." It was also stipulated "that in case any disputes or differences shall arise between the company and the contractor as to the construction, or true intent or meaning of the agreement, or the sufficiency of the performance of any of the work to be done under it, or the price to be paid, that all such disputes and differences shall be referred to the engineer, who shall consider and decide the same, and his decision shall be final between the parties, who do hereby submit, all and singular, the premises to the award, arbitration and decision of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed that the submission to the engineer touching all matters herein contained, agreed to be submitted to him, shall be deemed, considered, and taken as an essential part of this agreement, and not revocable by either of the parties hereto."

Allegations are made that the contractors performed all the conditions of the contracts to be by them performed; that they fully completed the work, and the same was accepted by the railroad company, but that the company has since its acceptance refused to perform its covenants, and has failed and refused to make, or cause to be made, a final estimate of the work and of the money due to the contractors.

The last of the stipulations in the contracts, to refer any disputes and differences which might arise between the contractors and the company, as to the construction of the contracts, or the sufficiency of the performance of any of the

work done under them, or the price to be paid to the chief engineer of the company for his abitrament and final decision, goes to the very foundation of the present action, and, if valid, operates to oust the jurisdiction of the Courts over the contracts; but such a stipulation in a contract is regarded as being against the policy of the law, and, for that reason, void; and, notwithstanding such a stipulation in the contract, an action may be maintained upon the contract without offering to comply with the stipulation. Such was the conclusion reached by this Court, after a review of the authorities in the case of *Holmes vs. Richet* (56 Cal. 307). In that case we held that an agreement to refer a case to arbitration will not be regarded by the Courts; but they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.

But the first of the stipulation referred to is not the equivalent of the last; it does not attempt to exclude the jurisdiction of the Courts over the contracts; it simply makes their enforcement dependent upon the settlement and ascertainment, by a third person, of the amount due and unpaid. As such, the obligation of the defendant to pay for the work did not arise until the final estimate was made by the chief engineer, showing all the work which had been done, the payments which had been made upon it, and the balance which remained due and unpaid. Upon the production of such a document the company promised to pay at its office in the city of San Diego. The right of the contractors to payment, or to enforce payment, was, therefore, by their contract, made dependent upon the act of the engineer, and until performance of that, no action could be maintained to enforce performance of the promise to pay, unless the defendant waived the condition by permitting the performance of the act, or the engineer himself, fraudulently or otherwise, refused to perform, or unless there was a breach of the condition by refusal of the defendant to have the estimate made on demand of the contractors, or to pay according to its promise, when it was presented at its office and payment demanded. But there are no such averments contained in the complaint—there are, therefore, no sufficient averments of a breach of the conditions upon which the contracting parties made the payment dependent. One party to a contract cannot complain of the other until he has put his adversary in default by not only a substantial performance of the contract on his part, but a failure or refusal to perform on the other.

In *Smith vs. Briggs* (3 Denio, 73), defendant had covenanted to pay the plaintiff for doing the carpenter work of certain

houses, when he should receive from the architect his certificate that the work was fully and completely finished, according to the specifications annexed to the contract, and it was held that the giving of the certificate by the architect was a condition precedent, the performance of which must be averred in the declaration in an action to recover payment of the work. *Morgan vs. Birnie* (9 Bing. 672) is to the same effect; and this Court, in *Holmes vs. Richet* (56 Cal. 307), affirmed the same doctrine. "If," says Mr. Justice Bramwell, in *Elliott Royal Assurance Company* (2 Ex. 245), "the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third party has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he bargained." "And," says the Supreme Court of Vermont, in *Henrick vs. Sewall* (27 Vt. 673), "If payment for the work performed is dependent upon, and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, etc., the obligation to pay will not arise until such estimates are made, unless no estimates have been made through the neglect or fault of the engineer or of the party who employs him."

These cases establish the proposition that the action in hand was, according to the allegations of the complaint, prematurely brought, and the demurrer to the complaint ought to have been sustained.

Many other questions arise out of the record, but in view of the conclusions reached, it is unnecessary to pass upon them.

Judgment and order reversed.

CONCURRING OPINIONS.

I concur in the judgment on the last point ruled in the foregoing opinion. As to the other points, I am of opinion that there is no error in the ruling of the Court below.

THORNTON, J.

We concur in the judgment on the ground that averment and proof of the estimates by the engineer, as provided for in the contracts, or averment and proof of legal cause for the non-production of such estimates, were essential to the vesting of a cause of action in plaintiffs.

Ross, J., McKinstry, J., Myrick, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8512.

WILLIAMS, RESPONDENT, vs. MORE, APPELLANT.

ATTORNEY—FIRM—EMPLOYMENT—PROFESSIONAL SERVICES—PARTNERS. Ordinarily, when one member of a firm of attorneys is employed, the firm is employed, and the employer is entitled to the services of all the members of the firm.

Id.—Id. The understanding between the partners in this case that, as respects the particular cases in which the services in question were rendered, each partner was to act as an individual and charge and receive compensation therefor as an individual, cannot affect defendant, in the absence of his knowledge of, and assent to, such arrangement.

Id.—Id. As the case is presented, when defendant employed the plaintiff, he employed the firm of which plaintiff was a member, and when defendant paid one member of that firm for services rendered by the firm, he paid both members of it for those services.

Appeal from Superior Court, Ventura County.

Flournoy & Mhoon, Haralson & Carlton and Brunson, for appellants.

Williams and Hamer & Pettinos, for respondent.

By the COURT:

At least a portion of the professional services for which a recovery in this case was had were rendered while the plaintiff was a law partner of W. T. Williams. He was such partner when the contract of the 1st of March, 1879, was entered into. Ordinarily, when one member of a firm is employed, the firm is employed, and the employer is entitled to the services of all the members of the firm. The understanding between the partners in this case that, as respects the particular cases in which the services in question were rendered, each partner was to act as an individual, and charge and receive compensation therefor as an individual, certainly cannot affect the defendant, in the absence of his knowledge of, and assent to, such an arrangement. Such knowledge and assent are not shown in this case. As the case is now presented, when More employed the plaintiff, he employed the firm of which plaintiff was a member, and when More paid one member of that firm for services rendered by the firm, he paid both members of it for those services.

Judgment and order reversed, and cause remanded for a new trial.

IN BANK.

[Filed January 25, 1883.]

No. 8409.

LORENZ ET AL., RESPONDENTS,

VS.

JACOB, APPELLANT.

EMINENT DOMAIN. Condemnation proceedings. The findings held insufficient to support the judgment in favor of plaintiffs. Further, the evidence shows that the use for which the property is sought to be taken is a private use. The main and substantial object of plaintiffs is to use the water in working their own mining claims.

Appeal from Superior Court, Trinity County.

F. P. Dunn, for appellant.

C. E. Williams, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiffs commenced proceedings in this case under Section 1238 of the Code of Civil Procedure to condemn certain lands belonging to the defendant, for the purpose of a ditch then under process of construction by them.

It is alleged in the complaint that the plaintiffs are now constructing and completing a ditch for the purpose of carrying water from a certain point on Connor Creek to plaintiffs' reservoir on Red Hill, in Trinity County, and that the uses for which the water is intended and designed are mining and irrigation. The Court below entered a judgment in conformity to the prayer of the complaint, and defendant prosecutes this appeal.

There are two points made by the defendant's counsel which we will briefly consider: *First*, the findings are insufficient to support the judgment; *second*, the evidence shows that the use for which the property is sought to be taken is a private use.

The following are some of the findings:

"3. That one of the uses for which the proposed ditch is intended is the sale and rental of water for mining and agricultural purposes.

"9. That the use to which plaintiffs intend to devote the proposed ditch is for the sale, rental, and distribution of water to the mining claims and agricultural land in said

Red Hill Mining District, including mining and agricultural land belonging to said plaintiffs, and is not a purely private use."

At the request of counsel for defendant the following additional finding was filed by the Court:

"5. With the exception of plaintiffs' own mine the owners of the different mining claims and agricultural lands mentioned could be served with water by means of ditches already in existence, and have been so served with water in former years. The ditches so used have ample capacity to carry the waters of Connor Creek, except in times of exceptionally high water. Some of these ditches have fallen into disuse or have been worked away, and with the exception of the Connor ditch, the Jacobs ditch, the Mackey ditch and the Butcher ditch, none of these ditches have rights of water of any value, either for mining or irrigating purposes. To serve the various claims and agricultural lands with water through these old ditches by letting the water run down Connor Creek would involve a great waste of water, unless purchasers would take it at all times, night and day."

The conclusion of the Court below was: "In conclusion, after a careful examination of the evidence offered, the following appears to be the true state of the case: Plaintiffs are the owners of the most valuable interest of any in the waters of Connor Creek, which stream is the only one available for working the mines in the Red Hill Mining District. This water they have used for many years past in working their own mines, occasionally renting some to others for mining or irrigating. Plaintiffs cannot work their mine to advantage by means of ditches now in existence, and rather than have their water become worthless, they propose to make a public use of it, in which use, as a part of the general public, they will be entitled to a share. The question is not free from difficulties; but, in my judgment, the statute should be liberally construed in a mining country; and if it appear that the intended use is a public one to a reasonable extent, the right of way should be granted."

We think that both points are well taken.

The findings are sufficient to show that the use for which the water was intended was a public use, and it clearly appears from the evidence that the main and substantial object of plaintiffs is to use the water in working their own mining claims. Private property cannot be taken for such a purpose. (*The Wilmington Canal and Reservoir Company vs. Dominguez*, 50 Cal. 505; *Cummings vs. Peters*, 56 Cal. 593; *Bankhead vs. Brown*, 30 Iowa 540.)

Judgment and order reversed, and the Court below is instructed to enter judgment in favor of defendant.

We concur: Myrick, J., McKinstry, J., Ross, J., Thornton, J.

New Law Publications.

THE FEDERAL REPORTER. Robert Desty, Editor. West Publishing Company, St. Paul, Minnesota.

We have just received Vol. XIII (bound). We have had occasion before to speak of this law publication. It is an invaluable one, and its subscribers can congratulate themselves that so accurate and industrious an editor has charge of it. The speedy publication of the decisions of the Federal Courts in one series is a great convenience to the Bench and Bar. This Reporter publishes all the decisions of all the United States Circuit and District Courts.

SUPREME COURT REPORTER.

The West Publishing Company have also issued the first number of the *Supreme Court Reporter*, as a supplement to the *Federal Reporter*, Robert Desty, editor. The prospectus states: "The *Supreme Court Reporter* will be devoted to the exclusive publication of the current decisions of the United States Supreme Court. The numbers will be issued promptly after the filing of the opinions, with appropriate *syllabi* and *indices*. The copy of each opinion will be furnished by the Clerk of the United States Supreme Court, and carefully revised in each instance, before publication, by the respective Judges of the Court." With three United States Supreme Court Reporters, the profession ought to be able to keep up with the Court.

Abstracts of Recent Decisions.

DAMAGES—REMOTE AND PROXIMATE CAUSE. A party is injured in a railroad accident, his injury brings on insanity, and the insanity induces suicide. *Held*: The accident too remote a cause. (*Scheffer vs. Washington etc. R. R.*, U. S. Sup. Ct., 8 Am. and Eng. Railroad Cases, 59; 10 Pac. C. L. J., 485.)

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No. 25.

Current Topics.

THE JUDICIARY AS A DEPARTMENT OF GOVERNMENT.

We publish in this issue an essay on "The Judiciary as a Department of Government," read by F. P. DEERING, Esq., of this city, on January 20th, 1883, before the "Young Men's Bar Association."

This Association, which does not seem to have attracted much attention from the public, was organized October 14th, 1882. Its objects are as stated in Article II, Constitution:

"The objects of this Association shall be to discuss legal questions, to assist in maintaining the honor of the legal profession, and to aid in promoting wholesome legislation, and the administration of justice."

The Association is officered as follows:

President—WALDO M. YORK.

First Vice-President—H. A. POWELL.

Second Vice-President—GEORGE T. WRIGHT.

Secretary—F. M. HUSTED.

Corresponding Secretary—CARTER P. POMEROY.

Treasurer—E. M. WILSON.

Committee on Admission—J. M. WHITWORTH, F. P. DEERING, THOS. F. BARRY, E. J. MCCUTCHEN, and R. E. WILSON.

There are also other standing Committees.

The regular meetings of the Society are on the first Saturday evening of each month. An essay is read at each regular meeting.

This young society of young lawyers bids fair to be of great utility to the younger members of the legal profession, and gives promise of being a public benefactor.

The Judiciary as a Department of Government;

An Essay Read Before the Young Men's Bar Association
January 20, 1883, by F. P. Deering, Esq.

To form an adequate conception of the importance of our Judiciary as a governmental agent, to appreciate the position which it holds in this country, is to consider not only its relation to its co-ordinate departments, but to trace its influence upon the people at large, and follow its history in the various phases of national and state policy. It will not be the purpose of this paper to review the action of the judicial body in preserving to us the Government of the United States. At some future period it may be permitted to the writer to prepare a sketch of the Judiciary, pointing out its influence in placing our Government on the foundation upon which it now rests, and in protecting and building the structure. No more inviting subject can be suggested to the legal student of our history than the "influence of the Judiciary in molding and preserving the present system of government among us." But to understand this branch of juridical inquiry necessitates an acquaintance with a question that lies at the very basis of our system of public polity. With that question it is proposed now to deal. In the spirit, therefore, of an introduction to the more interesting theme above adverted to, your attention is now requested to the consideration of the Judiciary in its relation to the co-ordinate departments of our Government—the executive and the legislative—and of such changes in the popular mind with respect to the Judiciary as may have taken place in the last one hundred and five years. Having thus shown the place of this department, we shall be then prepared for any future examination of the manner in which it has done its part.

Prior to 1775 the judicial power in the several colonies was wielded by appointees of the constituent authority, varying in the proprietary, provincial, and charter communities. But the idea of a Judiciary more or less independent of the executive and of the legislative body was an inheritance from the mother country, and in the colonies was to a greater or less extent observed. All of the first Constitutions of the thirteen original States provided for a separate judicial department. The unanimity which then prevailed in regard to the creation of that department, and the tenure of office, arrest our attention by reason of the striking difference of view which to-day uniformly exists in those particulars.

In all the colonial States the Judges were appointed. In South Carolina, North Carolina, Virginia, Connecticut and Rhode Island they were appointed by the Legislature; in New York by a council selected by the Legislature; in New Jersey, New Hampshire and Vermont by a council and the Assembly; in Maryland, Pennsylvania and Massachusetts by the Governor, with the consent of the council; in Delaware by the Governor, with the consent of the General Assembly.

Though the appointing power varied, it will be observed that in no instance did the colonists leave to the people the selection of the Judges for their highest Courts. In every State the members of the judicial department were selected by either or both of the other departments.

Certain abuses to which our forefathers were subjected led them to frame provisions in other particulars alike. The Declaration of Independence charges King George as follows: "He has made Judges dependent on his will alone for the tenure of their offices, and the amount and the payment of their salaries." It was but natural that any recurrence of this grievance should be guarded against, and so far from permitting the term of the judicial office to be dependent upon the will of any one, ten of the thirteen colonies declared, through their Constitutions, that their Judges should hold during good behavior, New York merely requiring her Judges to retire when they had reached sixty years of age. Pennsylvania, New Jersey and Rhode Island alone prescribed limited terms of office: the first two being for seven years, the last for one year. Yet in all the States a Judge was impeachable for misdemeanor, and in Pennsylvania, Maryland, Connecticut and Massachusetts he was removable by the Governor on an address by two-thirds of all members of the Legislature elected.

Again, they nearly all provided that the salary should be fixed during an incumbent's term. Some declared that it should be not diminished during the term of office—Rhode Island, Pennsylvania, Maryland; others said simply that it should be fixed—Delaware, Virginia, North Carolina, South Carolina. Delaware wished her Judges to have "an adequate, fixed, but moderate salary" (Const. 76, Art. XII), and Maryland prudently directed the salary of her Judges "to be liberal but not profuse" (*id.* Art. XI), while others still more carefully prescribed the amounts that should be given.

Thus far the Judiciary is kept distinct from the other departments. In one respect, however, there was a conferring of judicial power on co-ordinate branches of the Government. I do not refer to the impeachment of officers, although this is

a judicial proceeding, and was vested in the Legislature, but to the allotting of chancery and appellate powers to a Court, consisting of the Governor, or Lieutenant-Governor and his council, or members of the Legislature. This was the case with South Carolina, Delaware, New York, New Jersey, Connecticut, Rhode Island and New Hampshire. Nearly all of the States forbade the Judges to hold other offices, but the most of them confined the prohibition to certain specific offices, being generally that of Assemblyman or Congressman — Virginia, Maryland, Delaware, Pennsylvania, New York, North Carolina and South Carolina.

From this review it will be seen that at the times of the adoption of the first Constitutions by the thirteen States, the prevailing idea respecting the Judiciary was that it should not be elected by the people, but selected by the Governor and Legislature; that the Judges should hold during good behavior, should have a fixed salary, might be removed at the pleasure of two-thirds of the Legislature, were impeachable for cause, and should not sit, at least, in a legislative body. It is interesting to note that, after ten years of trial, these same views were wrought into the Constitution of the United States. In fact, in the Constitutional Convention of 1787 this very unanimity in the State Constitutions was urged as indicating a popular preference which ought to be regarded in the new fundamental law. Art. III, Sec. 1, of the National Constitution, as adopted, is short and comprehensive:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the Supreme and inferior Courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." And Art. II, Sec. 2, Div. 2, declared that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court."

This confidence of the colonists in their governmental agents deserves our special consideration. Not only did they grant to their Judges terms to endure during life, but they placed the power to select these Judges in the hands of the Legislature and Executive. The people, striving to shun the dangers of a monarchical form of government, blindly went to the opposite extreme, and gave to their Legislatures, which they fondly dreamt were but the selected representatives of themselves, powers which it was soon discovered could be as dangerously wielded by a body of men as by a

single tyrant. It is subject for reflection that the descendants of these people, who so fearlessly trusted their representative bodies, in addition to the numerous limitations placed upon their action by recently-adopted Constitutions, have taken from them the power of selecting the Judges. Yet, marked as this change in the popular mind has been, it is not found to be particularly reflected in the Constitutions of the thirteen original States. The reason is, perhaps, that these States have hesitated to alter their respective organic laws. In the absence of positive injury resulting from the old system of creating the Judiciary, it could not be expected that the people would take the momentous step of changing their fundamental law, no matter how greatly they might desire some alterations.

But the great under-tow of thought on this subject must be looked for, and will be found in the Constitutions of the new States. While many of the original States, by amendments or entirely new Constitutions, have recognized this change in the popular mind, it is in the creation of organic laws by new communities that an opportunity is best afforded to embody any improvements or preferences over the plans with which they were familiar. Of all the States formed since 1790, Louisiana, Florida and Mississippi, in Constitutions ratified since the war of the rebellion, alone give to the Governor and the Senate the power to appoint the Supreme Judges. Of the original thirteen States, seven—New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, South Carolina and Virginia—still concede a similar prerogative to their Executive and Legislature. Therefore, except in ten States—five New England and five Southern—the Judges are directly chosen by the people. That any of the States, at this day, should vest the selection of its Judges in the co-ordinate branches of Government, is explainable by reason of the conservatism of the New England States, many of which retain their original Constitutions with but slight amendments, and of the natural preference of the Southern States, in their Constitutions adopted since the war, to confide this important function to the Legislature than to the body of voters largely composed of emancipated slaves. In Virginia, by the Constitution of 1850, Mississippi, Constitution 1852, and Louisiana, Constitution 1832, the office of Judge had been declared elective.

In another important particular have the people determined to place the Judiciary more within their immediate control:

The tenure of the Judge's office during good behavior is being abandoned. In two of the new States only has this

life-tenure been introduced—in Maine in the Constitution of 1820, and in Florida in that of 1868; and in but three of the original Constitutions has it been retained—Delaware, Massachusetts and New Hampshire. In Maine and New Hampshire these life-tenures cease on the incumbents reaching seventy years of age. The biennial legislative appointment in Vermont, and the similar annual selection of Judges in Rhode Island, have operated almost in giving life-tenures, but the power to determine the office is retained to be used if needed. While, as it is perceived, there is a prevailing dislike to commission the Judges for life, yet there is no harmony in the tenure of office prescribed, it varying from one year in Rhode Island to fourteen years in New York.

In other particulars—the fixity of salary, singleness of office, and liability to impeachment—newly-adopted Constitutions follow their early models. Thirteen of the States now give the power to the Legislature, on a two-thirds vote of all its members, to remove a Judge: Kansas, Constitution 1859; Louisiana, 1868; Ohio, 1851; Oregon, 1857; Tennessee, 1870; West Virginia, 1872; Wisconsin, 1848; California, 1879; Virginia, 1870; South Carolina, 1868; Massachusetts, 1780; North Carolina, 1876; while Maryland, 1867, North Carolina and South Carolina give a like prerogative to the Legislature where a Judge is incapacitated by reason of mental or physical infirmity or continued sickness.

From this review it appears, then, that we of to-day have cast aside the plan of the men of '76 with respect to the Judiciary in these striking particulars: 1. The people now directly choose their Judges. 2. They are not willing that the judicial power should be wielded by any one for life. 3. The Courts of Appeal, consisting of the Governor and the members of the Assembly, are abolished.

To these conclusions one marked exception must be borne in mind: The National Constitution, so far as it affects the Judiciary, exists to-day in all respects as it was originally framed. The Judges of the United States Supreme Court are appointed and hold during good behavior.

In passing, let me call attention to some new features of recent State Constitutions, interesting in this connection as illustrating the tendency of the people to exercise direct supervision over the management of the Government. For example, sections have been introduced disqualifying a Judge by reason of relationship with a litigant (Arkansas and Texas), prohibiting his practicing law (Alabama, Arkansas and California), regulating his exchanging seats temporarily with another Judge, and in some cases directing the Judges

to note omissions and defects in the laws, and report the same to the Governor once a year (Colorado, 1876; Illinois, 1870). Most of these provisions are found in the statute-books of other States, but it is giving to them an exaggerated importance when placed in the Constitutions. But of all the assertions of popular control over the Judiciary, the most surprising was the attempt on the part of the Constitutional Convention in California to coerce the Judges to perform their sworn duty by declaring that they should not receive their salary until they had made oath that no cause submitted had remained undecided for ninety days.

Thus much has been said with respect to the selection, tenure and salary of the Judges, so that it clearly would appear how the people have changed their mind with regard to the Judiciary. The study of our history demonstrates that the people have more confidence in themselves than in their representatives, that they are taking from the Legislature all power not necessary to the proper exercise of the peculiar functions of that department. The popular distrust of the legislative body extends in a degree to the judicial members. Fearful that the representative chamber may encroach upon the liberties of the masses, they have learned to guard against similar danger from any other governmental agent, and have determined to select their Judges themselves, and give them but a limited tenure of office. Another reason of some weight for this remarkable revulsion of opinion concerning the Judiciary lies doubtless in this: the Judiciary has more power with respect to the other departments than the framers of the original Constitutions understood. This fact manifesting itself to the people, they have sought to keep the exercise of that power within safe bounds, by themselves directing who should wield it, and for what time.

This brings us to an investigation of that power, to a consideration of the relation of the Judiciary to the co-ordinate departments of government—the remaining branch of our proposed inquiry.

Immediately upon resolving to separate from England, the colonists set about forming local governments for themselves, after the pattern with which they were familiar, and adapted to their ideas of a republic. The governments were divided into three departments: there was no departure from this plan. But, in forming their first federal government for the united colonies, it is worthy of note that this generally-recognized scheme was not adopted. There was no judiciary power in the Articles of Confederation. This want was declared by Hamilton (Federalists, XXII letter) to be the crown-

ing defect of that instrument. In the Constitution of '87 it was remedied. And we now have in this country State and national judiciaries, whose importance in the preservation and growth of their respective governments cannot be overestimated. Says De Tocqueville (*Democracy*, 101): "Confederations have existed in other countries besides America, and republics have not been established on the shores of the New World alone; the representative system of government has been adopted in several States of Europe; but I am not aware that any nation of the globe has hitherto organized a judicial power on the principle adopted by the Americans."

* * * "The judges appear to be important political functionaries" (101). Yet the Americans have carefully restricted the action of judicial authority to the ordinary circle of its functions (102). Moreover, the Judges have the right not to apply such laws as seem to them unconstitutional (103). This last power is the most distinctive feature of the American Judiciary—they may refuse to recognize a law on the ground that it is unconstitutional. This seemingly omnipotent authority arises out of the existence among us of written fundamental laws, called Constitutions. It is not found in England, because there they have no such written Constitutions. Parliament makes laws, and is supreme; "it is at once a legislative and a constituent assembly" (De Tocqueville, p. 103). In France, when De Tocqueville wrote, the Judiciary were obliged to enforce the laws, as otherwise they would have the power of interpreting a Constitution which, according to the French idea, was unalterable; and under the present republic the Judiciary is but a part of the administrative branch of the Government.

This important function of our Judiciary was not created without objection. For forty years of our national existence the power was contested in different ways. The people had to be educated up to the idea of the Judiciary's right to pass all legislative acts in review before the Constitution. It was new in the history of the world. As will be shown presently, Legislatures, and even the President of the United States, resisted its assumption. The opponents to the adoption of the Constitution of 1787 attacked that instrument on the very ground that this power would be claimed under it, and, in reply, drew from Hamilton (*Fed. Letter LXXVIII*) this complete justification for such claim: "Some perplexity respecting the rights of the Courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the Judiciary to the legislative power. It is

urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable:

"There is no principle which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. * * * It is far more rational to suppose that the Courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. * * * The interpretation of the laws is the proper and peculiar province of the Courts. * * * If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. * * *

"It can be of no weight to say that the Courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the Legislature. This might as well happen in the case of two contradictory statutes, or it might as well happen in every adjudication upon any single statute. The Courts must declare the sense of the law, and if they shall be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no Judges distinct from that body."

The chief value of this power to declare a law unconstitutional lies in the protection which it affords the people against legislative encroachments. Nor is there any peril to the

Government in giving such a power to the Judiciary. That department is passive; its action must be called into operation by a case presented to it. The other departments are active; they take the initiative; the Judiciary never does. The Legislature controls the purse, the Executive the sword; the Judiciary has no active agencies; it possesses judgment alone. There are, however, some conspicuous instances of refusals to recognize this judicial right to determine the constitutionality of the acts of the legislative department of the Government. In Rhode Island, in 1786, *Trevett v. Weedon* (Cooley, Con. L. 161*n.*), the Judges were impeached for declaring unconstitutional a law imposing a penalty, without trial by jury, upon any one who refused to receive bills of the State Bank as specie, the colonial charter giving the right to such trial. Although the Judges were acquitted, they were not re-elected, and more pliant tools elected to their seats. Again, in Ohio, in 1807-8, Calvin Pease and George Tod were impeached for setting aside certain statutes relative to the jurisdiction of Courts of Justices of the Peace. A narrative of this trial contains the following: "These decisions, * * * it was insisted, were not only an assault upon the wisdom and dignity, but also upon the supremacy of the Legislature which passed the Act in question. This could not be endured, and the popular fury against the Judges rose to a very high pitch, and the Senator from the county of Trumbull in the Legislature at that time, Calvin Cone, Esq., took no pains to soothe the offended dignity of the members of that body, or their sympathizing constituents, but pressed a contrary line of conduct. The Judges must be brought to justice, he insisted vehemently, and be punished, so that others might be terrified by the example and deterred from committing similar offenses in the future." Both Judges were acquitted.

Such a scene as this seems very strange to us, who are familiar with the daily exercise by the Courts of their power to declare void a law as being in violation of the Constitution. Nor were they of frequent occurrence in our history. It was early settled by the Supreme Court of the United States what were the right and duty of the Judiciary, when a statute came in conflict with the fundamental law. The case is interesting for divers reasons; it was one of Chief-Justice Marshall's first decisions, and it disposes of two vastly important questions. The facts simply were: One Marbury, who had been appointed by Adams and confirmed to an office, applied to the Supreme Court of the United States for a writ of mandamus to compel Jefferson's Secretary of State to deliver to Marbury the commission

which had been signed and sealed, but not delivered, before President Adams' retirement. Chief-Justice Marshall decided that the writ could not issue out of that Court; that the Act of Congress authorizing it was unconstitutional, but that a Court having jurisdiction over such process could compel the delivery of the commission. In short, it was decided that the Judiciary could compel the performance by the Executive of his ministerial duties, and that the legislative acts were subject to judicial scrutiny and could be set aside (*Marbury v. Madison*, 1 Cr., 158). This ruling greatly annoyed Jefferson; but, to be consistent, he ought not to have resented the decision of the Court in setting aside the Act of Congress, for he himself advocated similar doctrines in the Constitutional Convention, when in reply to the argument that Congress should have a veto power over the enactments of the State Legislature, he said that Congress should look to the judiciary department to set aside a law that ought to be negatived. (2 Ban. Form. of Con., 90.) That such a negative does exist in the Courts over the Legislature is now no longer questioned. The power is confessedly very great; upon its proper exercise the prosperity of the country, and, is it too much to say, our destiny, depends. The Judges appreciate the gravity of their trust, and have adopted a uniform course in its observance fitted to accomplish the end designed by the granting of the power, and to guard against its improper use. The constitutionality of a statute will not be considered unless a decision upon the point is necessary. (*Trade Mark Cases*, 100 U. S., 96.) Not if there is a reasonable doubt. (Cooley, § 163.) Nor if the objection is raised by one whose rights the Act does not affect. (*Id.*) Nor solely on account of unjust or oppressive provisions which are not prohibited by the Constitution. (*Id.*, 164.) Nor merely on the score of expediency or policy. (*License Tax Case*, 5 Wall., 469.) Nor on the ground that the act in question is opposed to a supposed spirit pervading the Constitution. (Cooley, § 171.) Nor will the motives of the legislators be inquired into. (*Id.*, 187.) Moreover, only the objectionable portion of a statute will be set aside, if it can be separated from the valid portions. (*Id.*, 177.)

It will be observed, therefore, that, so far from taking advantage of this negative power over the acts of the Legislature, the Judges have used every precaution to its careful and just employment. But while the Judiciary is thus careful of the province of the Legislature, it will not suffer its own grand function to be superseded by any subterfuge of that body. The Courts will look to the effect of a statute for

the test of its constitutionality. (*Henderson v. Mayor of New York*, 92. U. S., 259; *Chy Lung v. Freeman*, *id.*, 275). Moreover, they will demand that the prescribed forms be observed in the making of laws, and will look to the Journals of the Houses of legislation to determine whether the Constitutional requirements in the passage of the legislative enactments have been complied with. This right of the Courts, not only to declare invalid a law regularly passed, but also to go behind the statute-books themselves to inquire into the regularity of its passage, has not been conceded without opposition. The variance of opinion can be realized from the adjudications, *pro* and *contra*, collated in the recent case of *Koehler v. Hill*, 17 W. Jur., 25, deciding the question in harmony with the statement above. That it is a proper prerogative of the judicial tribunal is, however, now generally recognized throughout the country. (Cooley, Const. Lim., § 135 *et seq.*) That it was not admitted without a struggle finds interesting illustration in the history of California, the State Courts disclaiming the power in *Sherman v. Story*, 30 Cal. 253, and the United States Circuit Court subsequently applying it in the *Railroad Tax Cases* on the ground of manifest design, apparent in the Constitution of 1879, that such was the people's will.

Not only over the Legislature does the Judiciary have a control, negative in character, but to the officers of the executive department, also, does its power extend. This question was involved in the *Marbury* case, was necessarily conceded in *Georgia v. Stanton*, 6 Wall., 72, where Georgia sought to prevent the Secretary of War from carrying into effect the Reconstruction Acts, was set at rest in *Kendall v. United States*, 12 Pet., where a mandamus was issued out of the Circuit Court of the District of Columbia to the Postmaster-General, and in numberless instances has been either directly affirmed or tacitly admitted by the State and National Courts.

The Judiciary, therefore, may issue its process to enforce the ministerial acts of the executive department, and may declare the enactments of the Legislature unconstitutional and void. This statement of itself suggests the vast influence upon the country's prosperity that our Judiciary must have had and still possesses.

Connected with the right to declare a law unconstitutional is the following proposition, which at two several times has agitated this land: Where the Courts have passed upon the constitutionality of a statute, are the Legislature and the Executive bound by that ruling whenever the question may

again arise? Jackson insisted that, notwithstanding the Courts had pronounced valid the Act creating the National Bank, as he had taken an oath to support the Constitution his obligation required him to determine for himself whether that Act was or was not in violation of that instrument.

And Mr. Evarts, in defending President Johnson during the impeachment trial, maintained that that Executive's conduct, with respect to the Tenure of Office Act, was justifiable, he having the right to determine its constitutionality, so far as his action under it was affected. But this is not the true view of the relations of the co-ordinate departments in this particular. Webster, in Jackson's time, explained its fallacy in language which to hear is to no longer doubt. (3 Webster's Work, 432 *et seq.*)

The Executive is indeed bound by his oath to support the Constitution, and is called upon, when a bill is before him, to exercise his judgment as to its constitutionality; but having approved the measure, having suffered it to become a law, thereafter he is as much bound by the construction of the Courts as any other citizen would be.

Pertinent to the consideration of the relation of the Judiciary to the co-ordinate departments is the exercise of judicial functions by the Legislature. While an extended treatment of this theme does not belong to the purposes of a paper relating to the Judiciary exclusively, an allusion thereto cannot be inappropriate, as disclosing the attitude of the judicial department when its domain has been invaded. Whenever legislation, judicial in its nature, has been brought to the attention of the Courts, they have uniformly and promptly declared it void.

This, therefore, is the position occupied by the Judiciary of this country: it restrains the Legislature, it keeps the Executive to the performance of his duties. In creating this mighty tribunal, it is safe to affirm that the colonists generally did not fully understand the functions with which they had endowed it. The realization of what had been done, together with the growing distrust of its own representatives, has induced the people to cast about the Judges those supposed safeguards of election to office and limited tenure indicated in the course of this paper. But the powers the Judiciary, as a governmental agent, wields have not been abridged. They endure to be exerted, as in time past, for the protection of the people's rights and the perpetuation of this republic, which, as history will disclose, it is the proud distinction of that body to have placed on its present firm foundations.

F. P. DEERING.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 8603.

TRASK, RESPONDENT,

VS.

THE CAL. SOUTHERN R. R. CO., APPELLANT.

NEGLIGENCE — FELLOW-SERVANTS — ENGINEER — TRAIN — LABORER — RAILROAD.

The injury complained of occurred on account of the unskillful, improper, and negligent manner in which defendant had constructed its railroad, whereby a construction train ran off the track. Plaintiff was employed in leveling and working on the track, and received the injury in going on the construction train to the place where he was engaged in work. *Held*, conceding that plaintiff and the engineer of the train were fellow-servants in the same general business, plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which defendant's road was constructed.

Appeal from Superior Court, San Diego County.

Cooper and Luce, for appellant.

Leach & Parker, for respondent.

By the COURT:

The demurrer to the complaint was properly overruled.

The point is made that the evidence shows that the plaintiff was injured by the negligence of the defendant's engineer, and that as he was engaged in the same general business with such engineer, he assumes, in taking employment, such a risk, and should not be allowed to recover. But the Court finds that the injury was caused by the unskillful, improper, and negligent manner in which the defendant constructed its road.

Conceding that the point urged, as to the relation of the plaintiff and the engineer, is correct, it has no application to the facts as found. The plaintiff did not assume the risks arising from the unskillful, improper, and negligent manner in which *defendant's* road was constructed.

It is said that the evidence is not sufficient to sustain the finding as to the construction of the road above stated. We have examined the evidence and are of opinion that it does sustain the finding.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8586.

WILLARD, RESPONDENT,

VS.

ARCHER ET AL., APPELLANTS.

VERDICT—DEFENDANT—PLURAL—SINGULAR—COSTS—LEASE—JUDGMENT—DAMAGES—ERROR. Plaintiff brought suit against E. A. and John Archer for damages for an alleged breach of a certain lease of land. The answer of the defendant was a general denial, the complaint being unverified.* The case was tried before a jury, and a general verdict rendered for the *defendant*. Thereupon judgment was entered in favor of the defendants, E. A. and John Archer, for costs. There was no motion for a new trial, but afterward plaintiff moved the Court to vacate the judgment on the ground that the verdict was for *defendant*, whereas the judgment entered was for the *defendants*. The Court below granted the motion and vacated the judgment for the reason assigned in the motion. *Held*, it ought not to have done so. The jury pronounced on the issues against the plaintiff. Having done so, the defendants were entitled to costs as a matter of law. The error or defect in the verdict in using the singular instead of the plural of the word defendant, did not affect any substantial right of the plaintiff, and was not, therefore, any ground for disturbing the verdict. (C. C. P., 475)

Id.—Id. *People vs. Sepulveda* (8 P. C. L. J., 64), distinguished.

Appeal from Superior Court, Yolo County.

J. Lambert, for appellants.

Ball, Craig & Harding, for respondent.

By the COURT:

Plaintiff brought suit against E. A. and John Archer for damages for an alleged breach of a certain lease of land. The answer of the defendants was a general denial—the complaint being unverified. The case was tried before a jury, and a general verdict rendered for *defendant*. Thereupon and on the 11th of March, 1882, judgment was entered in favor of the defendants, E. A. and John Archer, for costs. There was no motion for a new trial, but on the 29th of May the plaintiff moved the Court to vacate the judgment on the ground that the verdict was for *defendant*, whereas the judgment entered was for the *defendants*. The Court below granted the motion and vacated the judgment for the reason assigned in the motion. It ought not to have done so. Undoubtedly the jury pronounced on the issues against the plaintiff. Having done so, the defendants were entitled to costs as a

matter of law. The error or defect in the verdict in using the singular instead of the plural of the word defendant, did not affect any substantial right of the plaintiff, and was not, therefore, any ground for disturbing the verdict. (C. C. P., Sec. 475.)

This case is not like *People vs. Sepulveda* (8 Pac. C. L. J., 64). That was a criminal case, in which there were two defendants jointly indicted and jointly tried, and the verdict returned was: "We the jury find defendant" guilty. As it could not be ascertained from the verdict which one of the two defendants on trial had been found guilty, the verdict was held void for uncertainty.

Order reversed.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 8005.

SEYMOUR, RESPONDENT,

VS.

WOODS ET AL., APPELLANTS.

DISMISSAL OF ACTION — DISCRETION — ORDER — APPEAL — PRACTICE. In this case there was no clear and manifest abuse of discretion in setting aside an order dismissing the cause for want of prosecution.

Appeal from Superior Court, Nevada County.

Caldwell and *Thorn*, for appellant.

G. S. Hupp, for respondents.

By the COURT:

The Court below dismissed this cause, on motion of defendant, for want of prosecution, and on a further motion set aside the order of dismissal. An appeal is prosecuted from the last-mentioned order. The ruling of the Superior Court was liberal, but we cannot see that it abused its discretion in vacating the order of dismissal. A motion to set aside an order of dismissal is addressed to the sound discretion of the Superior Court, and this Court is disposed to sustain the ruling of the Court below, unless there is a clear and manifest abuse of discretion. No such clear and manifest abuse exists here, and the order must be affirmed. So ordered.

IN BANK.

[Filed January 23, 1883.]

No. 10,764.

PEOPLE, RESPONDENT, vs. BARRY, APPELLANT.

PERJURY. The information for perjury in this case held sufficient, and the false testimony upon which the charge is predicated, material to the issue in the action, in which it was given. But certain instructions were calculated to mislead the jury, on which ground defendant is entitled to a new trial.

Appeal from Superior Court, San Francisco.

Webb and Collins, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

An information was filed against the defendant charging him with the crime of perjury, and conviction being had, an appeal has been taken to this Court.

The defendant filed a demurrer to the information, which was overruled by the Court; and the first question presented for our consideration relates to the sufficiency of the information.

By Section 118 of the Penal Code it is provided that "Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

Bishop, in his work on Criminal Procedure, Vol. II, Sec. 901, says: "The elements of this offense to be alleged and proved are:

- " 1. A judicial proceeding or course of Justice;
- " 2. The defendant having been sworn to give evidence therein;
- " 3. His testimony;
- " 4. Its falsity.
- " 5. Its materiality to the issue or point of inquiry."

An examination of the information upon which the defendant was tried and convicted will show that it contains all of the elements above stated as constituting perjury at common law.

It is averred therein that the case of *The People vs. Isaac M. Kalloch*, charged with the murder of one Charles De Young, was on trial in the Superior Court of the City and County of

San Francisco, a Court having jurisdiction thereof; that on the trial the defendant was called, duly sworn and examined, as a witness on behalf of the defense; that on said trial he gave certain evidence, which is set forth in the information; that such evidence was false; that the defendant knew at the time it was given that it was false; and lastly, that it was material to the issue or inquiry. The materiality of the false evidence upon which the charge of perjury was predicated, is questioned on the appeal, and we will briefly consider it:

On the trial of Isaac M. Kalloch for the murder of Charles De Young, it became a material inquiry in the case whether or not De Young fired a shot at Kalloch before the latter fired at De Young, and on that trial Barry testified that he did. He was then asked if he (Barry) had not stated in a conversation at a designated time and place, and in the presence of certain persons named, that upon the occasion of the shooting of De Young, he, the said defendant Barry, saw Kalloch fire the first shot? He denied having made such statement. Was this a material inquiry, and could a false oath in respect to such a matter amount to perjury?

The evidence of Barry that De Young fired the first shot was most important and material, as it tended to establish a plea of justification set up and urged on behalf of Kalloch as a defense to the homicide with which he was charged. For the purpose of impeaching the witness it was certainly competent for the prosecution to prove that the defendant had, on an occasion prior to the trial, made the statement imputed to him, and before this could be done it was required of the prosecution to lay a foundation for such impeachment. This could only be done by calling the attention of the witness to the contradictory statement and interrogating him respecting it. It therefore became a matter material to the credibility of the witness; it was a circumstance material to the issue or point of inquiry, and a false oath respecting it was perjury.

In the case of *Wood vs. People of the State of New York* (59 N. Y. 123), it is said: "The indictment does not allege that either of the statements was material, nor do they appear to have been so on a comparison of the statements with the issues in the pleadings or by any extrinsic proof. It is not necessary that the false statement should tend directly to prove the issue in order to sustain an indictment. *If the matter falsely sworn to is circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is perjury.* And it is equally perjury if the false evidence tends to *discredit* the

witness. To the same effect is the rule laid down by the Supreme Court of Massachusetts in the case of *The Commonwealth vs. David Thompson* (12 Mass. 225).

In the case of *Rex vs. Giepe* (1 Ld. Raymond, 256), it was said "that it is not necessary to appear in an information for perjury to what degree the point in which the man is perjured was material to the issue, for if it is but circumstantially material it will be perjury. * * * So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduce to the proof of the point at issue."

It appears to us to be plain, both on principle and authority, that the question whether the defendant Barry had made the statement, respecting which he was interrogated, and which statement he denied having made, was material to the case on trial, and that a false oath concerning the same involved crime of perjury.

But the judgment will have to be reversed for error in the charge of the Court to the jury. The following is a part of it:

"I charge you that if you believe from the testimony beyond a reasonable doubt that there was such trial in due course of law of said Kalloch in this Court, and that defendant on such trial was a witness duly sworn in the cause, and that he did testify in the cause, and did in such testimony willfully, falsely and knowingly convey to the jury in such case, intentionally, the idea and impression and belief, according to his testimony, that it was not said Kalloch, but was said De Young, who fired the said first shot, and this was done knowingly, willfully and intentionally and falsely, for the object, reason and intent, and to the end that said jury should be misled by his testimony that it was said De Young, and not Kalloch, who fired the first shot, * * * and the defendant in the case, and for that purpose and to that end, did give such testimony, inconsistent with and contradictory to such alleged statements before made, or alleged to have been made, did give it falsely, knowingly and willfully, then I charge you that the accusation of the information against him for the alleged perjury is as fully made out as if the precise words had been proved before you."

The Court did not keep in view the charge on which the defendant was being tried. The accusation contained in the information was not that on the trial of Kalloch the defendant swore falsely as to who fired the first shot, but it was simply a charge that the defendant on that trial denied that he had on a previous occasion stated that Kalloch fired the first shot. The question as to who did in fact fire the first shot was not the charge upon which he was being tried.

Conceding, therefore, for the purpose of the argument, that the defendant did, in his testimony, willfully, falsely and knowingly convey to the jury on such trial the impression and belief that it was not Kalloch, but De Young, who fired the first shot, yet he could not have been convicted of perjury therefor, on that information, because that was not the false oath with which he was charged. The charge of the Court was clearly erroneous, it was calculated to mislead the jury, and on plain and well-established rules of law it becomes our duty to reverse the judgment.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Thornton, J., Myrick, J., Ross, J., Sharpstein, J.

I concur in the judgment: McKee, J.

IN BANK.

[Filed January 26, 1883.]

No. 8265.

COLE, PETITIONER,

VS.

SUPERIOR COURT, ETC., RESPONDENT.

GUARDIAN AD LITEM—ATTORNEY—ACTION—COURT—DAMAGES—COSTS—ORDER—CONTRACT—JURY. The Court in which an action was pending and judgment obtained has power to fix the compensation of the attorney employed by the guardian *ad litem*, and order the balance of the money collected by the attorney paid into Court.

Id.—Id. In cases where there is no one authorized to make a binding contract, Section 1021 C. C. P. does not apply.

Id.—Id. A guardian *ad litem* cannot make a contract for the payment of compensation to an attorney which shall absolutely bind the ward or his estate.

Id.—Id. There is no place here for the doctrine of an implied promise upon the *quantum meruit*. The presumption of a promise is rebutted by the fact that the guardian *ad litem* had no power to contract in such manner as to bind the assets of the ward, except conditionally.

Id.—Id. Such portion, only, of the money collected will be the attorney's property as the Court may fix; and until so fixed he has no such right of property as is contemplated by the Constitution. The guarantee of the right of trial by jury does not apply to such a case as this. There is no question of fact for a jury to try. The Court fixes the amount, and, when so fixed, it is settled.

Review.

E. D. Wheeler, for petitioner.

M. C. Hassett, for respondent.

MYRICK, J., delivered the opinion of the Court:

A writ of review was granted, on the application of petitioner, to review the action of the Superior Court had upon the following state of facts:

Catharine McKeever, an insane woman, and John McKeever, Jane McKeever and Mary McKeever, minors, by their guardian *ad litem*, Margaret Hayes, commenced an action against the Market-street Railway Company to recover damages for the death of Daniel McKeever, the husband of said Catharine and the father of said minors. The said guardian *ad litem* employed the petitioner, E. P. Cole, Esq., an attorney-at-law, to commence and prosecute said action as attorney for the plaintiffs. The guardian *ad litem* had no means with which to pay the necessary expenses of the action, including costs and the attorney's fees, and Mr. Cole undertook to and did pay the costs. Such proceedings were had in the action that, on the 9th day of December, 1880, judgment was recovered by the plaintiffs against the Railway Company for \$6,501.25 damages, with interest, and \$108.50 costs, which judgment, on appeal, was affirmed by this Court. Upon the going down of the remittitur an execution was issued February 3, 1882, and on the following day, February 4, the Railway Company paid to Mr. Cole the sum of \$7,144.26, being the full amount then due for damages, interest and costs; and Mr. Cole caused satisfaction to be entered. During the pendency of said appeal in this Court, to wit, on the 28th day of October, 1881, letters of guardianship of the persons and estates of the said minors were duly issued by the proper Court, to wit, the Superior Court of the City and County of San Francisco, to Daniel Sheerin. On the 4th day of February, 1882, the day on which the attorney received the amount of the judgment, the said Daniel Sheerin, as guardian, petitioned the Superior Court in which said judgment had been rendered for an order that Mr. Cole pay the money into Court, that the Court fix his proper compensation. An order to show cause was made and served. On the hearing, the attorney admitted the reception of the money, and that he was ready and willing to pay, to any person authorized to receive the same, the amount which justly and fairly belonged to the plaintiffs, but objected that the Court had no authority to fix the compensation or to compel him to pay the money into Court. The Court overruled the objection, and, after hearing testimony, fixed the full compensation of counsel for the plaintiffs, for services and expenses, at \$2,500, and ordered that the amount received be paid into the Court by two o'clock of February 8, 1882. On the 9th day of February, 1882, Mr. Cole paid into Court \$4,644.26, leaving

in his hands \$2,500, the amount fixed by the Court, and on the same day the Court ordered that \$3,000 of the amount so paid be paid to Sheerin, the guardian of the minors, on his giving a proper bond.

The question for consideration before us is, as to the power of the Superior Court in which the action was pending, and the judgment was obtained, to fix the compensation of the attorney employed by the guardian *ad litem*, and order the balance paid into Court. It is proper to remark, that the only objection appearing on the part of the attorney is as to the power of the Court to make the order. It is argued on his behalf that the Court had no power "to take from Mr. Cole's pocket money lawfully in his possession, and that he claimed in good faith to be his own, and transfer it to the custody of the Clerk of the Court" [we quote from the argument]; that the Constitution of this State guarantees to all the right of trial by jury, and that "no person shall be deprived of life, liberty or property without due process of law;" that he had the right to submit to the jury, in a regular action instituted to that end, evidence as to what would be a proper compensation, and to have the determination of the jury thereupon.

By the law of this State, Section 1021 Code of Civil Procedure, "the measure and mode of compensation of attorneys and counselors-at-law is left to the agreement expressed or implied of the parties;" and in cases where an attorney is employed by a person capable of making a contract, which shall bind him or those whom he may represent, the attorney may have his action to recover the amount agreed upon in the one case, or the value of the services in the other; and in such cases the fact of the existence of the contract and the amount agreed upon, or the value, may be submitted to a jury. But, in cases where there is no one authorized to make a binding contract, the section of the Code above referred to would not apply. There must be some one on either side authorized to contract, or there is, of course, no valid contract. In *Gurnee vs. Maloney*, 38 Cal. 85, this Court held that the administrator of the estate of a deceased person could not make a contract for the payment of fees for services to be rendered by an attorney which would bind the estate. It seems to have been conceded in that case that the administrator had power to select an attorney, but such selection would be made and the services would be rendered in view of the rule that the proper Court [in that case the Probate Court] would have the right to pass upon and determine the proper compensation. In the matter before us,

neither of the plaintiffs in the action under consideration could have employed an attorney to commence or prosecute the action—neither could have brought the action in his or her own name—each of them was under disability; it was, therefore, necessary that the action should be brought by a general guardian or by a guardian *ad litem*. In the case of a general guardian, the appointment would have been made after due proceedings under Article II, Chapter 14, C. C. P.; in the case of a guardian *ad litem*, the appointment would be made by the Court in which the action was pending or was about to be commenced. It is not necessary to consider, in this case, the powers of a general guardian regarding the employment of an attorney; we are now considering only the powers of a guardian *ad litem*. The guardian *ad litem* is an officer of the Court appointing him; his duties are “to represent the infant, insane, or incompetent person in the action or proceeding.” (Code of Civil Procedure, 372.) He may doubtless, employ an attorney to assist him in the prosecution or defense of the action, but he may not make a contract for the payment of compensation which shall absolutely bind the ward or his estate. He is like an agent, with limited powers. If he collect the amount of a money judgment recovered by the plaintiff in the action, it should seem that, from the nature of his office, he may be compelled to an accounting by the Court from which he received his authority. The Court is, in effect, the guardian—the person named as guardian *ad litem* being but the agent to whom the Court, in appointing him (thus exercising the power of the sovereign State as *parens patriæ*) has delegated the execution of the trust; and through such agent the Court performs its duty of protecting the rights of the infant or incompetent person. His powers are certainly no greater than those of a general guardian. Like the latter, he may be allowed a credit for moneys advanced or paid, out of the fund collected, as reasonable compensation for the expenses and for the services of an attorney. But he has no power by specific agreement with the attorney to fix such compensation absolutely. An attorney accepting employment and rendering services under such circumstances, must rely upon the subsequent action of the Court in ascertaining and adjudging proper compensation. He cannot determine the amount, nor can he retain what he or the guardian *ad litem* may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon the *quantum meruit*. The presumption of a promise is repelled by the fact that the guardian had no power to con-

tract in such manner as to bind the assets of the ward, except conditionally. The attorney performing legal service for the infant aids the Court in carrying out its duty of protection; he is not only an officer of the Court in the general sense, but is the special agent through which the Court acts; in this respect his position being analogous to that of an attorney employed by a general guardian, or by an executor or administrator. In the cases last referred to, the compensation is, under our system of laws, fixed by the Probate Court. The statute being silent as to the tribunal which is to fix the compensation in case of a guardian *ad litem*, it seems to reasonably follow that the Court placing him in position and making use of his service would have the fixing of his disbursements and the compensation of the attorney employed.

The cases cited by the petitioner do not apply to this case. *In re Paschal*, 10 Wall., 483, was a case of employment *with power to contract*. In that case the party applying for the order that his attorney pay to him the amount collected was capable of contracting, and had contracted for the employment and for the compensation; and the attorney claimed the right to have his accounts with the client fully adjusted. The Court held that it would not, in such a proceeding, adjust the accounts, but would leave the party to his action. The Court did not stand in any such relation with the party and the attorney, as Courts stand with regard to infants and attorneys acting in their behalf.

It is urged that, by not permitting the attorney for the infant to retain such portion of the money collected as he may deem just, he is deprived of his property without due process of law, and is also deprived of his constitutional right of trial by jury. The error of the petitioner is in supposing that any specific portion of the money is his property. Such portion, only, of the money collected will be his property as the Court may fix; and until so fixed, he has no such right of property as is contemplated by the Constitution. In accepting the employment, he consented to perform his duty without other compensation than such as might be allowed by the Court. The guarantee of the right of trial by jury does not apply to such a case as this. There is no question of fact for a jury to try. The Court fixes the amount, and when so fixed, it is settled.

It is also urged that there was no power to direct the money to be paid on the application of the general guardian; that so long as the guardian *ad litem* remained unrevoked, the general guardian had no standing in regard to the suit. It is sufficient to say that the appointment of the guardian *ad*

litem is made, as the name of the office indicates, for the purpose of the suit—to represent the ward *in the action*. When the action is terminated, the amount recovered becomes assets of the ward, to be managed and controlled for his benefit. The guardian *ad litem* does not manage the ward's general estate, investing and re-investing, but such duties are performed by the general guardian; and in order to perform those duties, he should have the control of the property.

The amount allowed to Mr. Cole for his services and disbursements was \$2,500. The costs recovered amounted to \$108.50. It would thus appear that the Court allowed as compensation for services nearly \$2,400; and these amounts he was permitted to retain. The Court certainly had power to direct him to pay over the remainder. Possibly the Court might have had power, before fixing this amount for his services, to require him to pay over the whole sum collected, and afterward make such allowances as should be just, but the Court saw fit to make the allowance first, and order the balance to be paid over. We see no error.

Writ dismissed.

We concur: Morrison, C. J., Thornton, J., Ross, J.

DISSENTING OPINION.

It is conceded that the guardian *ad litem* was authorized to employ an attorney to prosecute the action for the infant plaintiffs, and that the plaintiff here was duly employed by said guardian *ad litem* to prosecute said action, and that he did prosecute it to final judgment; and that he received the sum recovered and discharged said judgment, as he was authorized to do. (C. C. P., 283.)

And it will probably be conceded that if the parties, for whom he appeared in the action in which he recovered such judgment, had been adults, the Court in which said action was tried could not in a summary manner have determined the "measure and mode" of his compensation, because that "is left to the agreement express or implied of the parties." (C. C. P., 1021.) There are cases in which a Court will summarily compel an attorney to pay over money which he has received in satisfaction of a judgment recovered by his client. But those are cases in which it is charged and made to appear that the attorney by not paying the money over is acting in bad faith. "It is this misconduct on which the Court seizes as a ground of jurisdiction to compel him to pay the money in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a *quasi*-criminal proceed-

ing in which the question is not merely whether the attorney has received the money, but whether he has acted improperly in not paying it over. If no dishonesty appears the party will be left to his action. (*In re Paschal*, 10 Wall. 483.)

The only question which we have to determine in this proceeding is, whether the Superior Court acted without or in excess of its jurisdiction? And unless this case is distinguishable from *Paschal's*, this question is not altogether new. For, as we interpret the opinion in that case, the Court distinctly held that, in the absence of an allegation or proof of bad faith on the part of an attorney retaining money collected by him for a client, the Court would not have jurisdiction to proceed in a summary manner against the attorney to compel him to pay it over to the client. That it was *prima facie* the duty of the attorney, "after deducting his own costs and disbursements," to pay over the residue to his client. But that for his fees and disbursements he had a lien upon the fund in his hands, and was under no obligation to pay over anything beyond the amount remaining in his hands after deducting the amount of his fees and disbursements. And that where it appeared the attorney and client *honestly* differed as to the amount of such fees and disbursements, they would be left to the usual remedy at law. A motion for an order to have an attorney pay over money which he has collected for a client cannot be properly granted unless the neglect or refusal to pay it over be imputable to a dishonest motive. The motion must be based upon the misconduct of the attorney. That is necessary in order to give the Court jurisdiction to proceed in a summary manner. Such we understand to be the doctrine of the Court in *re Paschal*, and it commends itself to our judgment.

But it is contended that that case differs materially from this. In that case the parties for whom the attorney had collected the money which it was sought to have him compelled to pay over were adults. In this case they are infants. But it is not contended that the attorney in this case was not authorized to receive the money recovered and to acknowledge satisfaction of the judgment. Nor is it contended that he did not have lien upon the fund in his hands for the amount of his fees and disbursements; or that he had no right to retain in his hands the amount of said fees and disbursements. But it is claimed that because the residue, after deducting the amount of said fees and disbursements, would belong to the infants, the Court had jurisdiction to proceed and determine in a summary manner the measure of compensation of their attorney. But the Legislature, when enacting

that the manner and mode of compensation of attorneys should be left to the agreement of the parties express or implied, did not provide that in cases where infants were parties the measure and mode of compensation of their attorneys should be left to the Court in which the action was tried.

And there does not seem to be any very good reason for making any such distinction. It cannot be assumed that a Judge, by proceeding to determine, in a summary manner, the amount of compensation to which an attorney is entitled for services rendered in behalf of infant parties, would be more favorable to the infants than a jury, or that there would be less likelihood of justice being done between the parties after both had had an opportunity of a fair trial before a Court and jury than there would be if the matter was summarily heard and determined by a Judge upon motion.

And the general guardian who appears on behalf of the infants in this proceeding could as well have commenced an action as to have made a motion for the adjustment of the matter in controversy between his wards and the plaintiff herein.

The analogy between this case and one in which a general guardian of an infant sues or defends for his ward, is too slight to warrant a Court in holding that the rules which prevail in regard to the employment and compensation of counsel by a general guardian can be applied to a case in which counsel appears on behalf of infants in an action in which they sue or defend by a guardian *ad litem*. Speaking of the appointment of a guardian *ad litem*, Abbott says: "Such an appointment does not seem to involve any relation of guardianship in any full or significant sense of the term, so little is any custody of person or estate involved." (Abbott's Law Dict.)

There is no law which authorizes such a guardian to allow or present to a Court for allowance any claim for compensation of counsel for services rendered for the ward of such guardian.

And in *Smith vs. Smith* (69 Ill. 303), it was distinctly held that, in the absence of a statute authorizing it, the Court in which an action had been tried in which an infant appeared by a guardian *ad litem* and an attorney, the fees of the latter could not be taxed by such Court, upon the petition of the guardian *ad litem*, but that such fees could only be recovered in the usual mode against the general guardian, and collected out of the infant's estate. In that case the action in which the attorney had appeared for the infant involved the title to real estate, and the attorney did not, as in this case, have the fruits of the litigation in his own hands. So that

the question of the right of the attorney to hold on to money recovered in an action for an infant client until his, the attorney's, fees were paid, was not involved in that case. But by parity of reasoning it would seem that if in the one case the attorney must sue the general guardian for his fee, in the other the general guardian must sue the attorney for such amount as the attorney retained over and above his fair compensation; that is, in a case like this, in which it is not claimed that the attorney withholds anything beyond the sum to which he *honestly* believes himself entitled.

If the summary jurisdiction of the Court depends, as was held in *re Paschal* (*supra*) upon the question of the attorney's good faith in withholding what he claims to be due him, it is quite clear that the Court below exceeded its jurisdiction in making the order now before us, and therefore it should be annulled.

SHARPSTEIN, J.

I dissent. The moneys collected by the petitioner in this proceeding, as attorney-at-law for his infant clients, constituted the estate of the infants. To the possession of the estate and of the persons of the infants the general guardian was entitled. The guardian was subject to the supervision and amenable to the orders of the Superior Court, sitting as a Probate Court; and the estate was a probate matter, over which the Court had, as a Probate Court, under Section 5, Article VI, of the Constitution of 1879, the exclusive jurisdiction. As such it alone had authority to ascertain and determine the proper amount of compensation to which the attorney for the infants was entitled for the services which he had rendered in securing the estate of the infants; and upon the presentation of a petition or claim against the estate for such services, it could, in the exercise of its jurisdiction, allow and order paid out of the estate what was just and reasonable.

But the Superior Court, sitting as a Court of law, exercising its jurisdiction over parties to an action at law, in which a money judgment had been rendered and satisfied, had no jurisdiction of the money, collected in satisfaction of the judgment, as part of the estate of the infants. Nor had it jurisdiction to ascertain and determine in the action the amount of compensation to which the attorney for the infants, who collected the judgment, was entitled for his services. The guardian could not make any contract with the attorney which would be binding on the estate of his wards. Such a contract, if made, would be, so far as the estate is concerned, null. (*Paige's Estate*, 57 Cal. 238; *Danielwitz vs. Sheppard*, 10 Pac. C. L. J., 542.)

McKEE, J.

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EXTREME CRUELTY.

In Michigan a husband lately sought a divorce from his wife on the ground of extreme cruelty. This consisted of "petty annoyances, complaints and fault-finding, and the disparagement of complainant's common sense, taste and judgment." The parties could not plead the indiscretion of youth as an excuse for their disagreement. They had been married thirty-seven years, had children and grand-children, were prominent and conspicuous persons in society, and members in good standing of a church. The Court denied the divorce, probably upon the theory that quarreling had become a necessity of their lives, a confirmed habit which their great age would not allow of discontinuing.

In New Hampshire a wife recently sought and obtained a divorce from her husband on the ground of extreme cruelty. In this case the extreme cruelty consisted of too much cohabitation. The Court did not attempt to lay down any rule in this regard, probably owing to the paucity of such cases in the reports.

Supreme Court of California.

IN BANK.

[Filed December 29, 1882.]

No. 10,780.

PEOPLE, RESPONDENT, VS. TAMKIN, APPELLANT.

HOMICIDE—SELF-DEFENSE—JUSTIFICATION—EVIDENCE. It appeared, substantially, that deceased had threatened to kill defendant, armed himself with the avowed purpose of carrying such threats into execution, and these matters were communicated to defendant. Subsequently, and after a hostile demonstration was made by deceased toward defendant, he declared to defendant his unwillingness to take any advantage of an unarmed man, such as he believed defendant to be, and turned his back upon defendant and began to walk away. While deceased was in this position with reference to defendant, with his back to him and in the act of walking away from him, defendant drew a pistol and almost immediately thereafter discharged it with fatal effect. *Held*, defendant was not justified. He was in no immediate danger at the time, and there was no necessity, real or apparent, for the deadly assault.

ID.—INSTRUCTIONS. The Court correctly charged the jury upon the law of self-defense, conceding that the evidence tended to make out such a case.

ID.—ID. Of an objection to an instruction on the subject of threats, based upon the use of the word "solely"—"threats made by the deceased against the defendant are admitted in evidence *solely* to enable the jury to determine as to who was the aggressor in the fatal encounter"—*held*, no injury could have resulted to defendant, as a case of self-defense was not established.

ID.—LANGUAGE—TRUCKEE. In the eye of the law, insulting language is no excuse for a deadly assault, "and this is so, even at Truckee."

ID.—THREATS. Upon a charge of homicide, threats are admissible in evidence for the purpose of illustrating or determining the question as to who was the assailant in the fatal encounter; they are also admissible when they have been communicated to defendant, for the purpose of determining whether they, in connection with the other facts and circumstances of the case, were sufficient to excite reasonable fears in the mind of defendant.

Appeal from Superior Court, Nevada County.

Dibble & Kitts and *Cross*, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was prosecuted by information for the crime of murder, and was convicted of manslaughter. The facts disclosed by the evidence in the case clearly establish the killing, and the only defense relied upon is that of justification.

A difficulty occurred between the defendant and the deceased the night before the homicide, in the course of which the deceased received a severe blow on the head from a pistol in the hands of the defendant, and from that time down to a few seconds before the shooting, the deceased, at short intervals, uttered threats against the life of the defendant, at the same time using violent language and opprobrious epithets respecting him.

We have no doubt of the correctness of the position taken by the learned counsel for the defense, that threats are admissible for the purpose of illustrating or determining the question as to who was the assailant in the fatal encounter, and that they are also admissible when they have been communicated to the defendant, for the purpose of determining whether the threats, in connection with the other facts and circumstances of the case, were sufficient to excite reasonable fears in the mind of the defendant. "A person whose life has been threatened by another whom he knows, or has reason to believe, has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary." (*People vs. Scoggins*, 37 Cal. 683. See, also, *People vs. Travis*, 56 *id.* 251; *Stokes vs. The People*, 53 N. Y. 174.)

We will now examine the evidence for the purpose of determining how far the principles above stated apply to the present case. That the deceased threatened to kill the defendant, that he armed himself with the avowed purpose of carrying such threats into execution, and that all these matters were fully communicated to the defendant, clearly appears from the evidence. But the next inquiry is, whether the conduct of the deceased was such, at the time of the shooting, as to justify or excuse the killing? Did the circumstances occurring at the time of the homicide show an apparent design on the part of the deceased to carry his threats into execution? Was there any demonstration made by the deceased showing an immediate intention to execute the threats? Was there any ground for a reasonable belief that

the party threatened was about to lose his life or to suffer serious bodily injury unless he immediately defended himself against the attack of his adversary? The following is, in substance, the evidence touching upon the matter: The witness Lovern says: "Tamkin and I were walking down street, when McClellan (the deceased) hailed Tamkin from behind. We turned around, and McClellan stood there facing us. He said to Tamkin, 'I suppose you are as well heeled as you were last night?' Tamkin said, 'I am not heeled.' McClellan then said, 'Go and heel yourself, for I am fixed.' Tamkin said, 'Where shall I go to get fixed?' McClellan said, 'Go where you d——d please. It makes no difference to me. What did you do to me last night?' Tamkin said, 'I really don't know.' McClellan raised his hat, showed a scar, and said, 'That is what you did, you d——n son of a ——.' Tamkin replied, 'I am very sorry for it.' McClellan said, 'Yes, I guess you are. I can lick you any place in the world, you d——d, etc.; go and heel yourself. I don't want to take any advantage of you.' He turned and walked away, I should judge fifteen feet from Tamkin, when Tamkin drew a pistol from his right-hand pocket and said, 'Yes, I am heeled, you d——n son of a ——; what do you want?' and fired his pistol. McClellan partly stooped, drew his pistol from his right-hand coat-pocket as he stooped, staggered, and fired a shot at Tamkin." Other shots were fired by both parties, but the evidence shows that it was the first shot that inflicted the mortal wound upon the body of McClellan. The ball penetrated the side of McClellan, and the shot was fired before the deceased had turned his face to the defendant. Several witnesses gave an account of the circumstances attending the shooting, and although differing somewhat in some of the minor and unimportant details of the homicide, there is, upon the important and substantial facts, no material difference. It is but natural that several persons witnessing such an occurrence should differ somewhat in the details of the transaction; and nothing more than a natural discrepancy is found in the evidence in this case.

The witness Jaques testified that "McClellan said: 'I won't take any advantage of you, but you go and heel yourself,' and then turned square around and started to walk away." There was no conflicting evidence upon the point that, after the hostile demonstration was made by McClellan, he declared his unwillingness to take any advantage of an unarmed man, such as he believed the defendant to be, and then turned his back upon the defendant and began to walk away. It was while the deceased was in this position with

reference to the defendant, with his back to him, and in the act of walking away from him, that the defendant drew his pistol and almost immediately thereafter discharged it, with fatal effect, upon the person of deceased. Will the law justify or excuse him under such a state of facts? We think not. The defendant was in no immediate danger at the time, and there was no necessity, real or apparent, for the deadly assault. The deceased could easily have excused his threat, if it was really his intention to take the life of the defendant; but after the defendant had falsely stated to him that he was unarmed, and, after all present and immediate danger had passed, the deceased having turned around to move away, the defendant drew his pistol and fired the fatal shot. We are not familiar with any principle of law that would justify a homicide committed under such circumstances. (See *People vs. Campbell*, 8 Pac. C. L. J. 293, and authorities therein cited.)

2. The next point made on behalf of the defendant is that the Court erroneously charged the jury as follows: "If the killing was intentional it was unlawful, and there was no justification unless the killing was in necessary self-defense, as defined in these instructions." The Court correctly charged the jury upon the law of self-defense, and, taking the charge as a whole, the law upon this branch of the case was correctly given to the jury, conceding (which we do not) that the evidence tended to make out a case of self-defense or justifiable homicide.

3. The Court also instructed the jury as follows: "If the question as to who commenced or brought on the conflict in which the deceased lost his life is in doubt, threats made by the deceased against the defendant are admitted in evidence *solely* to enable the jury to determine as to who was the aggressor in the fatal encounter." The objection is to the word "*solely*" in the foregoing instruction; and it may be that the instruction in a proper case should not contain such a limitation. But having held that the evidence failed to establish a case of self-defense, no injury could have resulted to the defendant from the instruction as given.

4. Witnesses were asked if such language as was used by the deceased to the defendant the night before the homicide "was not considered fighting language at Truckee?" The question was objected to, and the objection was sustained by the Court. It is sufficient to say that in the eye of the law, insulting language is no excuse for a deadly assault, and this is so, even at "Truckee."

After a review of the whole case, we find no error in the proceedings sufficient to warrant a reversal of the judgment.

The law was given to the jury as favorably for the defendant as the circumstances of the case warranted, and the erroneous rulings, if any there were, did not injure the defendant in any of his substantial rights.

Judgment and order affirmed.

We concur: Ross, J., Myrick, J., McKee, J., Thornton, J.

DEPARTMENT No. 2.

[Filed December 30, 1882.]

No. 8582.

MITCHELL, RESPONDENT,

VS.

BECKMAN ET AL., APPELLANTS.

CORPORATION—STOCKHOLDERS—BANK—SUBSCRIBERS. Action brought under Section 322 of the Civil Code against defendants as subscribers to the capital stock of a corporation doing a commercial banking business, against which plaintiff held an unsatisfied judgment. *Held*, the allegations of the complaint (set forth in the opinion) are sufficient.

ID.—ID.—ULTRA VIRES. Plaintiff's money was originally deposited in a bank. Afterward an arrangement was entered into between such bank and the corporation of which defendants were stockholders, by the terms of which all the assets of the bank were assigned and transferred to the corporation, and thereupon the corporation assumed all the liabilities of the bank. *Held*, as the corporation received all of the assets of the bank, which were sufficient to satisfy all the debts of the bank, as the corporation opened an account with plaintiff, crediting her with the amount in suit in her pass-book as a deposit, and paid dividends on the same for more than three years, and of which dividends defendants received their respective shares in proportion to the number of shares of stock subscribed for by them, it is too late now for the stockholders to urge the defense of *ultra vires*.

ID.—ID. To make a person an owner, it is not necessary that he should have paid for his stock. A corporation may give credit for its stock. Nor is it necessary that certificates should have been issued. When a corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract, made upon a valuable consideration.

ID.—STATUTE OF LIMITATIONS—DEPOSITS. As to the Statute of Limitations, the recent case of *Harmon v. Page* (December 22, 1882) cited with approval. Further, Section 348 C. C. P. applies to the case: "To actions brought to recover money or other property deposited with any bank, banker, trust company or savings and loan society, there is no limitation."

Appeal from Superior Court, Sacramento County.

Cadwalader & Devlin, for appellants.

Catlin & Hamburger and Edgerton, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The complaint in this case alleges that the Odd Fellows' Savings and Commercial Bank is a corporation, existing under the laws of California ever since the 10th day of February, 1875, and organized for the purpose of carrying on a commercial banking business; that the defendants are subscribers to the capital stock of the bank in amounts specified in the complaint; that on the 31st day of December, 1878, the corporation above named was indebted to the plaintiff in the sum of \$5,625.72, upon an account for so much money at and before that time had and received by the said corporation from the plaintiff to and for plaintiff's use, and at the special instance and request of said corporation, which sum said corporation thereafter, to wit, at the place and on the day last aforesaid, undertook and promised to pay plaintiff when it should be thereunto afterward requested; that plaintiff has recovered a judgment against the corporation for that amount, no part of which has been paid; that the defendants were, at the time such indebtedness accrued, stockholders in the corporation named; that the corporation suspended all business and closed its doors on the 21st day of September, 1878, since which time it has not resumed business, etc.

The action is brought under the statute, and the allegations in the complaint are sufficient. The case has been argued at great length and with much ability, but it does not seem to us that the points involved are of difficult solution. The main leading facts are that the corporation (the bank) was doing a commercial banking business in the city of Sacramento; that the plaintiff deposited a certain amount of money in it which has never been repaid; that the plaintiff brought an action and recovered a judgment for the amount against the bank, which judgment remains in full force and effect. Whereupon plaintiff seeks to charge the defendants in this action, as subscribers to the capital stock of the corporation.

It appears, from the evidence in the case, that plaintiff's money was originally deposited in the Odd Fellows' Bank of Savings as early as the year 1873, and that on the first day of March, 1875, an agreement was entered into between the two institutions above named, by the terms of which all the assets of the last-named institution were assigned and transferred to the Odd Fellows' Savings and Commercial Bank, and thereupon that institution assumed all the liabilities of the former bank. It is claimed that this assumption of the liabilities of the old bank by the new one was void for several reasons. But it is sufficient for us to say, on this branch

of the case, that the new bank received all of the assets of the old, which were sufficient, as appears from the evidence of Samuel Poorman, the President of both corporations, to satisfy all the debts of the old bank. He was asked by the Court the following question: "Were all the assets transferred to the new bank, and were the assets sufficient to discharge the liability of the Odd Fellows' Bank of Savings?" Ans.—"Well, I believe they were more than sufficient. I had been President of the Odd Fellows' Bank of Savings for a considerable time before that, and was President of the Odd Fellows' Savings and Commercial Bank for nearly three years after that, and was familiar with the assets and their values." It may be added, if anything more in this connection is required, that the new corporation opened an account with the plaintiff, crediting her with the amount in her pass-book as a deposit, and paid dividends on the same for more than three years. Of these dividends the defendants received their respective shares, in proportion to the number of shares subscribed for by them, and it is too late now for them to urge the defense of *ultra vires*.

2. Another point made in the case is that several of the defendants never paid for the whole amount of the stock subscribed for, and never received certificates therefor. But "to make him an owner, it is not necessary that he should have paid for his stock. A corporation may give credit for its stock as well as for any other property sold by it. Nor is it necessary that certificates should have been issued. These only constitute proof of property which may exist without them. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration." (*Chaffin v. Cummings*, 37 Me. 83. See, also, *Spear v. Crawford*, 14 Wend. 20; *The Chester Glass Company v. Dewey*, 16 Mass. 94; *in re South Mountain Consolidated Mining Company*, 7 Sawyer, 30; Section 322 Civil Code.)

3. The Statute of Limitations is relied on as a defense to this action. In the recent case of *Harmon v. Page et al.*, No. 7413 (December 22, 1882), this Department had occasion to consider the application of the above statute as a defense in favor of subscribers to the capital stock of a corporation, and the authorities there referred to show that the statute is no bar to the action. But there is a provision of the Code of Civil Procedure which is conclusive on this point. Section 348 reads as follows: "To actions brought to recover money

or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation." It is true that this action is not brought directly against the bank, but is brought against the subscribers to the capital stock (Sec. 322 Civil Code); and the section is applicable to this case.

Other points are made in the printed argument filed on behalf of the defendants, but we think that all the real questions involved in the case have been considered by us in this opinion.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 8626.

ESTATE OF MAGEE.

SUCCESSION—BASTARDS—ESTATE. Suez Magee and Elizabeth Remond (born out of wedlock) were daughters of Susan Magee. The mother deceased first, then Elizabeth died, leaving, lawful issue, a son—Albert Remond. Then died Suez Magee, without issue, and the question was, did Albert inherit her estate? *Held*, he did not. (Sections 1386, 1387, and 1388, C. C.)

Appeal from Superior Court, Santa Barbara County.

Wright and Oglesby for appellant.

Stratton and Stroke for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

Suez Magee and Elizabeth Remond (born out of wedlock) were daughters of Susan Magee. The mother deceased first, then Elizabeth died, leaving, lawful issue, a son—Albert Ernest Remond. Then died Suez Magee, without issue, and the question here is, did Albert Ernest inherit her estate?

Sections 1387 and 1388 of the Civil Code read as follows:

"Section 1387. Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered

brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

"Section 1388. If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease to her heirs-at-law."

Section 1386 of the same Code provides for the order of succession to the estates of intestates.

At the common law an heir is he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor. According to this definition the heirs of a decedent are those persons enumerated in the first nine subdivisions of Section 1386. It is in this sense that the term must be supposed to be used in Section 1388, and throughout the Civil Code, unless it clearly appears from the immediate context that it is employed in a different sense.

It is distinctly declared in Section 1387 that, while an illegitimate child shall be the "heir" of his or her mother, he or she shall not represent his or her mother, by inheriting any part of the estate of her kindred, "either lineal or collateral, unless," etc.

It is claimed, however, that "kindred" includes only legitimate blood relations. A bastard, at the common law, is *kin* to nobody. (1 Black. Comm., 459.) Being *nullius filius*, he can have no brother or sister, nor other heir than of his body. (Co. Litt., 36; 2 Kent, 212.) It is said that as, by Section 1387, the illegitimate inherits his or her mother's estate, he or she inherits by representation all the estate which the mother would have taken had she not deceased, with the single exception that he or she does not represent the mother (mother being dead) as to the estate of her *legitimate* relations; and, as a consequence, in the case before us—Elizabeth Remond, if she had been living at the time of the death of her sister, Suez Magee, would have taken as representative of her deceased mother, Susan Magee. It would follow that Albert Ernest, son of Elizabeth, would be the heir of Suez.

But the statute treats of legitimacy as a normal condition, bastardy as exceptional. It provides that the child born out of wedlock shall inherit his mother's estate, but shall not

represent his mother, if she shall die first, by inheriting any part of the estate of her kindred. The rule of the statute departs from the common law so far as that the illegitimate takes the property of which her mother dies seized or possessed, no further. It does not contemplate the case of an illegitimate claiming to "represent" her mother, who, when living, was heir of another illegitimate. The sections of the Code are, of course, to be read together. There is no doubt that Section 1386 (although there are no express words confining its application to such) has reference to legitimates alone, and the word "kindred" in 1387 relates to the kindred there mentioned. The statute is intended to exhaust the subject, and the right of representation is conferred only in the cases mentioned in 1386. The declaration that an illegitimate "does not represent," etc., in 1387 being inserted *ex abundanti cautela*.

Section 1387 of the Civil Code can hardly be misunderstood. It provides that an illegitimate shall not "represent" his deceased mother, except where his parents shall have married, and his father after such marriage shall have adopted or recognized him. In case of such adoption (the section declares), the adopted child and the legitimate children "are considered as brothers and sisters," and on the death of either of them intestate, without issue, the others inherit his estate and are heirs, "in like manner as if all the children had been legitimate." If the parents of Suez and Elizabeth had married, and after the marriage, the father had adopted or acknowledged both, Elizabeth would have been heir of Suez. But the claim, that—both being illegitimate—one inherits the estate of the other, through the common mother, is not supported by any provision of the statute of successions.

Judgment affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed January 2, 1883.]

No. 7464.

ESTATE OF SBARBORO.

REVOCATION OF WILL—PETITION—FILING—JUDGE—CLERK—ORDER—CITATION. Proceedings for the revocation of the probate of a will must be commenced in the Court in which the will was proved within one year after the probate (Sec. 1327 C. C. P.) If the validity of the will or its probate be not contested within that time, the validity and probate become final and conclusive upon all parties interested in the estate, except infants and persons of unsound mind (Secs. 1333, 1908, C. C. P.)

- Id.—Id.** Proceedings for contesting the probate of a will are a suit in the nature of an action by parties interested in the estate against the administrator, with the will annexed, or the executor of the will, the legatees, devisees and heirs of the estate; and they are commenced by filing a petition in the Court in which the will was proved.
- Id.—Id.** A petition is filed by delivering it to be filed to the officer of the Court who is entitled to receive it for that purpose and to the custody of it after it has been filed. The Clerk of the Court below was the only person entitled to the custody of the petition. As custodian of the papers of a cause, he was, therefore, the only person to whom the petition could have been presented or delivered for filing; and when presented, it was his duty to receive and indorse it filed.
- Id.—Id.** As the petition had not been, in fact, filed in the Court within the "year," it was too late to file it at all; and the Court could not legally, after the expiration of the time, by order, relieve the petitioners from the legal consequences of their own laches or delay. Time was of the essence of the proceedings commenced by the petitioners.
- Id.—Id.** Presenting an unfiled petition to the Judge of a Court for the purpose of obtaining from him an order for a citation upon it, is not filing it in Court, nor the equivalent of filing it. It is no part of the duty of a Judge to receive a petition in a cause for filing, or to file it, or to make an order for its filing, or for issuing a citation upon it, unless some law expressly requires of him the performance of such a duty.

Appeal from the Superior Court of San Francisco.

Burnett and Sawyer, for appellants.

Splivalo and Hunt, for respondents.

McKEE, J., delivered the opinion of the Court:

This appeal is from certain orders and judgment entered in a proceeding for revocation at the probate of the last will and testament of G. Sbarboro, deceased.

Proceedings for the revocation of the probate of a will must be commenced in the Court in which the will was proved, within one year after the probate. (Section 1327 C. C. P.) If the validity of the will or its probate be not contested within that time, the validity and probate become final and conclusive upon all parties interested in the estate except infants and persons of unsound mind. (Sections 1333, 1908, C. C. P.) Proceedings for contesting the probate of a will are a suit in the nature of an action by parties interested in the estate against the administrator, with the will annexed, or the executor of the will, the legatees, devisees and heirs of the estate, and they are commenced by filing a petition in the Court in which the will was proved. A petition is filed by delivering it to be filed to the officer of the Court who is entitled to receive it for that purpose, and to the custody of it after it has been filed. The Clerk of the Court below was the only person entitled to the custody of the petition. As custodian of the papers of a cause, he was, therefore, the only person to whom the petition could have been presented for filing, and when presented, it was his duty

to receive and indorse it filed. As matter of fact, the petition in the case *was* delivered to the Clerk of the Court for filing about 9 o'clock A. M. of the third day of December, 1879; but the decree of the Court admitting the will to probate had been entered on the second day of December, 1878, and the "year," within which the probate could be contested, had run at midnight of December 2, 1879; therefore the petition was not filed in time, and the validity of the will and its probate became final and conclusive upon the petitioners—they being under no legal disabilities. However, the Clerk indorsed the petition as follows: "Filed by order of Court, December 2d, 1879." But the indorsement was made on the 4th day of December, 1879, under the following order, made by the Court on the same day: "It is by this Court ordered that the Clerk of this Court mark the said petition filed as of December 2, 1879, and that he make and enter the said order as of the same day." That order was made upon proof to the satisfaction of the Court that between the hours of seven and eight o'clock P. M. of December 2, 1879, the petition, before it was filed or presented to the Clerk for filing, had been presented to the Judge of the Court at his private residence, for an order for the issuance of a citation upon it, and for the purpose of examining it, so as to determine whether the petitioners were entitled to the order; the Judge retained the petition in his possession until the morning of the third day of December, 1879, when he took it to the office of the Clerk of the Court, and, about nine o'clock A. M. of that day, delivered it, with his order for the issuance of a citation thereon, to one of the deputy-clerks of the Court, in the Clerk's office, and verbally directed him to file the same as of the 2d of December, 1879; but the Clerk did not, at the time of receiving the petition from the Judge, file it, because the attorneys for the administrator with the will annexed, being present, objected; and on the 4th day of December, 1879, the Court heard the objection and overruled it, and made the order requiring the Clerk to indorse the petition filed as of the 2d day of December, 1879, which was accordingly done. The Court afterward refused to set aside its order, and denied a motion made to correct the indorsement of the filing by the Clerk so as to show the true date of the filing, but upon the trial found the facts as to the presentation and filing of the petition upon which its order was made.

The ruling and order of the Court were erroneous. As the petition had not been, in fact, filed in the Court within the "year," it was too late to file it at all; and the Court could not legally, after the expiration of the time, by order, relieve

the petitioners from the legal consequences of their own laches or delay. Time was of the essence of the proceedings commenced by the petitioners. The provisions of the law directing the proceedings to be had and the time within which they might be commenced were, in that regard, imperative, not directory, for the law declared the effect of not commencing them in time—it made the thing which the proceedings were intended to assail conclusive and unassailable; and the Court in which the proceedings were begun had no authority, by order or otherwise, to direct that to be done which had not, in fact, been done, or to adjudge that which the law pronounced conclusive to be valid and void. Presenting an unfiled petition to the Judge of a Court for the purpose of obtaining from him an order for a citation upon it, is not filing it in Court, nor the equivalent of filing it. It is no part of the duty of a Judge to receive a petition in a cause for filing, or to file it, or to make an order for its filing, or for issuing a citation upon it, unless some law expressly requires of him the performance of such a duty. There was no law which required of the Judge of the Court in this case performance of any one of those acts. The duty of filing the petition, and issuing citation upon it, when filed, was cast by law upon the Clerk of the Court. (Sec. 1328 C. C. P.) Being purely ministerial acts, they had to be done within the time prescribed by law; and as they were not done by the proper officer, the rights of parties, which had attached and become fixed by reason of their non-performance, could not be disturbed. It was, therefore, error for the Court by its order to direct the Clerk to indorse on the petition that it had been filed on a day when it was not, in fact, filed, nor delivered to him for filing. The order to that effect should have been set aside and the petition itself dismissed.

Judgment and order reversed, and cause remanded.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 1.

[Filed January 2, 1883.]

No. 7533.

MOORE, APPELLANT, VS. JONES ET AL., RESPONDENTS.

COVERTURE—COMMUNITY PROPERTY—HUSBAND AND WIFE—DEED—SEPARATE ESTATE—PRESUMPTION. From the fact that deeds were made during coverture in the name of the wife, the presumption arises that the property thus acquired was community property, which, upon the death of the wife, belonged, without administration, to the surviving husband, who had the right to dispose of it. (C. C. 1401.) But that is a controvertible presumption subject to be rebutted by proof that

the consideration moneys recited in the deeds were paid out of the separate funds of the wife, and the plaintiff, as purchaser of the property from the surviving husband, took with notice that the purchase-money may have been paid by the wife with the moneys belonging to her separate estate, and that the property was her separate property.

ID.—COMMINGLING OF FUNDS—TRUST—AGENT. The fact that the husband had commingled the wife's money with moneys of other persons did not divest her of her rights to her separate fund. Commingling it with the money of others did not destroy it as her separate property, nor change the relation of trustee and *cestuy que trust* as to its custody, to that of debtor and creditor.

ID.—MONEY. Money has no ear-marks, and for that reason the mingling of trust with private funds can injure no one.

ID.—EVIDENCE—DECLARATIONS. Declarations by the husband to parties that the money with which the property was purchased belonged to the wife as her separate property were properly admitted in evidence. The declarations to that effect to the witness from whom the wife purchased, at the time of the purchase, were part of the *res gesta*, and those made to the other witnesses were admissible, as the declarations of a grantor made in relation to the property while holding title to it, as against plaintiff, his grantee.

Appeal from Superior Court, San Francisco.

Shafter, Parker & Waterman, for appellant.

Drown & Barnes, for respondents.

McKEE, J., delivered the opinion of the Court:

In this case it appears that on the 28th of February, 1858, John Sullivan, being in possession of the lot of land in controversy, sold and conveyed it to Mary R. Jones by a deed which recited a consideration of \$2,725. The grantee named in the deed was, at the time, the wife of Edward Jones. Upon the deed she and her husband entered into possession of the lot and fenced it, and built upon it a dwelling-house, in which the family resided. While in possession application in the name of the wife was made to the Commissioners of the Funded Debt of the City and County of San Francisco for title to the lot, under the provisions of an Act of the Legislature of California approved April 14, 1862; and the Commissioners conveyed the lot in the name of Mrs. Jones, by a deed reciting a consideration of \$500. On the 7th of January, 1864, Mrs. Jones died, leaving surviving her her husband and three children—one of whom has since died, and the other two are the defendants and respondents in this case.

On the 12th of April, 1865, the surviving husband conveyed the premises by deed to the plaintiff and appellant, who brought the action in this case against the children to quiet his title to the lot.

From the fact that the Sullivan deed and the deed by the Commissioners of the Funded Debt were made during coverture, in the name of the wife, the presumption arises that the property thus acquired was community property, which, upon the death of the wife, belonged, without administration, to the surviving husband, who had the right to dispose of it (Sec. 1401 C. C.); but that was a controvertible presumption, subject to be rebutted by proof that the consideration moneys, recited in the deeds, were paid out of the separate funds of the wife; and the plaintiff, as purchaser of the property from the husband, who was not named in the deed, took with notice that the purchase-money may have been paid by the wife, with the moneys belonging to her separate estate, and that the property was the separate property of the wife. Of course, a contestant of the presumption that property thus acquired is community property must overcome that presumption by satisfactory proof to the contrary; hence it was incumbent on the defendants to establish that the moneys which were paid to Sullivan and the Fund Commissioners for the lot, were of the separate estate of their mother, to whom the deed was made during coverture.

The Court found that the moneys with which the lot was purchased and improved were the separate estate of Mrs. Jones. That fact being established, the land and premises were her separate estate; and as she died intestate, and seized of them at her death, they descended to her heirs—her surviving husband and three children—and were vested in them in the following proportions: One-third thereof in Edward Jones, the surviving husband, and two-ninths in each of the three children—the death of one of the children afterward leaving the entire two-thirds interest in the surviving children; therefore, the plaintiff, by his deed from Edward, took only an undivided one-third interest in the property.

It is, however, claimed that the evidence was insufficient to sustain the finding and decision of the Court, that the property was purchased with the separate funds of Mrs. Jones, and that it became her separate estate; but we think the proof abundantly established both. It was clearly established that Mrs. Jones had received, during coverture, from the estate of her father, Jacob S. Moore, deceased, over \$20,000 in coupons and bonds, bank certificates and drafts, the moneys realized from which she deposited with her husband. At the same time the husband was in the habit of receiving moneys from many parties, which he kept with the money of his own and of Mrs. Jones mixed indiscriminately in his safe; and when the property in contro-

versy was purchased, he paid for it with money withdrawn from the mixed fund. But the purchase was made for her and in her name, and the purchase-money was paid out of her separate funds by the husband, as her agent, "at her desire and request," and it was, in effect, a payment made by herself. (*Drais v. Hogan*, 50 Cal. 121.) The fact that the husband had commingled her money with the moneys of other persons did not divest her of her rights to her separate fund. It was in the hands of the husband as her agent and trustee, who was entitled by law to the control and management of it. Commingling it with the money of others did not destroy it as her separate property, nor change the relation of trustee and *cestuy que trust* as to its custody, to that of debtor and creditor: "Money has no ear-marks, and for that very reason the mingling of trust with private funds can injure no one. The value being the same, and it being a matter of the most perfect indifference whether parties get the same or other coin, so they get the sum to which each is entitled, there can result no injury to any one. Common sense will not discuss the question of identity, when nothing useful can result from its determination." (*Gunter v. James*, 9 Cal. 660; *Lathrop v. Bampton*, 31 *id.* 17.)

There was no error in admitting in evidence declarations made by the husband to the different witnesses that the money with which the property was purchased belonged to the wife as her separate property. The declarations to that effect to the witness Sullivan, from whom the property was purchased, at the time of the purchase, were part of the *res gestæ* (*People v. Vernon*, 35 Cal. 49; Sec. 1850 C. C. P.); and those made to the witnesses were admissible as the declarations of a grantor made in relation to the property, while holding title to it against the plaintiff as his grantee. (Sec. 1849 C. C. P.; *Ingersol v. Truebody*, 40 Cal. 603; *Stanley v. Green*, 12 *id.* 148; *McFadden v. Ellmaker*, 52 *id.* 348.)

Judgment and order affirmed.

We concur: Ross, J., McKinsty, J.

IN BANK.

[Filed January 13, 1883.]

No. 8026.

McCREERY, RESPONDENT, v. FULLER ET AL., APPELLANTS.

JUDGMENT—FORMER RECOVERY—EJECTMENT. The matters in issue were determined against plaintiff herein in a former action brought against him by one Keller, under whom defendants claim title.

LAND LAW—PATENT. By the certification and patent the title to the land in controversy passed from the United States to the State. Thereafter the authorities of the United States were without jurisdiction over it. The title, which had vested in the State and passed from it to the plaintiff in the former action, could not be divested except by judicial proceedings to cancel or rescind the patent for fraud, mistake, or misconstruction of the law under which it was issued.

Id.—Id. No executive officer of the United States has authority to recall or rescind a patent, and issue one to another party for the same tract.

Appeal from Superior Court, Los Angeles County.

R. M. Widney, for appellants.

Gould & Blanchard, for respondent.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action of ejectment. From the record of the case it appears that the demanded premises were selected by the State of California on the 22d of April, 1868; that on the 29th of December, 1869, the plaintiff, McCreery, entered upon them and filed his declaratory statement in the proper United States Land Office on the 28th of November, 1871. But on the 24th of November, 1871, the Secretary of the Interior of the United States had approved the selection which had been made by the State; and the United States, by patent of that date, conveyed the land to the State. After obtaining the patent the State sold the land to one M. Keller, and issued to him a certificate of purchase for the same, which was afterward confirmed by an Act of the Legislature entitled "An Act for the relief of purchasers of State Lands," approved March 27, 1872; and on the 4th of March, 1874, Keller obtained from the State a patent for the land.

Claiming to be owner in fee, Keller, on the 24th of April, 1874, commenced an action of ejectment against McCreery to recover possession. By his answer to the complaint in that action the defendant denied the ownership of Keller, and affirmatively alleged that the patent issued to the plaintiff by the State of California, and under and by virtue of which his pretended title to the land in controversy is set up and maintained, was obtained by fraud and misrepresentation; and that the defendant had, on the 21st day of December, 1869, entered on the land as a qualified pre-emptor, and on or about the 28th of November, 1871, filed, in the Land Office of the district in which the land was situated, his declaration of intention to pre-empt said land, and that he was entitled to the possession of the same.

Upon these issues the parties to the action stipulated, on the 30th of June, 1874, "that judgment may be entered of

this date for the plaintiff for the possession of the premises described in the complaint herein, but without any rents and profits or damage for the withholding the same. Execution is to be stayed on this judgment for sixty (60) days, within which time defendant may without molestation remove any buildings or other improvements from said premises for his own use, without further compensation therefor." Judgment was accordingly entered in favor of Keller against McCreery, for recovery of the possession of said land and premises, together with his costs and disbursements. Under that judgment Keller was put in possession of the land; and, being in possession, he sold and conveyed the same, on the 11th of October, 1874, to Frederick Fuller, the then husband of one of the present defendants, who entered into possession under his deed, and continued to reside on the land until his death, in July, 1876, since which time his widow has continuously, down to the commencement of this action, on October 28, 1879, occupied the land, cultivating the same within a substantial inclosure.

It will be observed that the issues in that action involved not only the validity of the original selection of the land by the State, and of the subsequent proceedings with reference to it, which culminated in the certification of the land over to the State, and the issuance of the patent to the State, but also the validity of the original entry on the land by the defendant, as a qualified pre-emptor, and the subsequent proceedings taken by him to pre-empt the same. These things being in issue, were all necessarily determined by the judgment in favor of the plaintiff. No question can arise as to whether that judgment was correct or erroneous. Standing as it does, as the judgment of a Court of competent jurisdiction, unappealed from and unreversed, it is decisive of the rights of parties to the subject-matter of the action whether it was right or wrong. Where issues are made in a case and decided, whether with or without trial, the judgment is conclusive between the same parties, in any subsequent action for the same cause, as to all questions which were directly involved within the issues made, and which were, or might have been, presented and decided (*Le Guen v. Governor*, 1 Johns. Cas. 436; *Stockton v. Ford*, 18 How. 418; *Mallony v. Horan*, 49 N. Y. 14; *McClurg v. Condit*, 27 Minn. 45); and such questions cannot be again contested between the same parties in the same or any other Court. (*Hopkins v. Lea*, 6 Wheat. 109; *Russell v. Place*, 94 U. S. 606.) As *res adjudicata* the judgment is binding on all tribunals, and conclusive between the parties and those deriving title under them, as

to the validity of the certification of the land over to the State, and of the patent thereto issued by the United States to the State, and of the patent granted by the State to Keller, upon which the judgment was founded. By the certification and patent the title to the land passed from the United States to the State of California. (*Grinnel v. R. R. Co.*, 103 U. S. 742.) Thereafter the authorities of the United States were without jurisdiction over it. The title which had vested in the State, and passed from the State to Keller, the plaintiff in the judgment, could not be divested, except by judicial proceedings to cancel or rescind the patent for fraud, mistake or misconstruction of the law under which it was issued. (*O'Connor v. Frasher*, 56 Cal. 499, and cases cited.) No executive officer of the United States had authority to recall or rescind the patent, or to issue one to another party for the same tract. (*Moore v. Robbins*, 96 U. S. 530.) The proceedings taken by McCreery in the Land Department of the United States, which culminated in a patent to him for the same land, subsequent to the acquisition of the title by the State, and to the judgment against him founded upon that title, were therefore void, and conferred upon him no title.

It follows that the judgment and order must be reversed and the cause remanded, with directions to the Court below to enter judgment for defendants.

I concur in the judgment: McKinstry, J.

CONCURRING OPINION.

I concur in the judgment, on the ground that the judgment in *Keller v. McCreery* is conclusive against the plaintiff and determinative of the cause in favor of Fuller, who derives title under Keller by conveyance subsequent to the rendition of the judgment above mentioned. THORNTON, J.

I concur in the judgment and opinion of Mr. Justice Thornton: Morrison, C. J.

IN BANK.

[Filed January 13, 1883.]

No. 10,776.

PEOPLE, RESPONDENT, v. SCHMIDT, APPELLANT.

HOMICIDE—INFORMATION—MALICE. "Malice aforethought" is a necessary ingredient in the crime of murder, and should be alleged in an information, or words equivalent in their import be substituted.

Id.—Id. In the information in this case, neither "malice aforethought" nor words equivalent thereto in their import are used. This is a fatal omission.

Id.—Id. The information alleged: The said S., on, etc., at, etc., "willfully, unlawfully, and feloniously, did shoot, kill, and murder" M. S., contrary, etc.

Appeal from Superior Court, Butte County.

Reardon & Freer and Graves, for appellant.

Attorney-General Hart, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The appellant was tried and found guilty of murder of the first degree upon an information which alleged that he committed the crime of murder as follows: "The said Herman Schmidt, on the 24th day of June, 1882, at the county of Butte and State of California, and before the finding of this information, willfully, unlawfully and feloniously did shoot, kill and murder M. Schmidt, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California."

"Murder is the unlawful killing of a human being with malice aforethought." (Pen. C. 187.) Malice aforethought is a necessary ingredient in the crime of murder, and should therefore be alleged in the indictment. (*People v. Urias*, 12 Cal. 325; *People v. King*, 27 *id.* 507; *People v. Bonilla*, 38 *id.* 699.)

"Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used." (Pen. C. 958.) And in *People v. Vance* (21 Cal. 400), it was held that the words "willfully, maliciously, feloniously and premeditatedly," were equivalent in their import to "malice aforethought." But the words "maliciously" and "premeditatedly" do not occur in this information, and those are the very words, and the only words, in the indictment in *People v. Vance*, *supra*, which, in our opinion, were equivalent in their import to "malice aforethought." In *People v. Stevenson* (2 Cal. 273) the Court said: "It is alleged that the defendant, at a time and place mentioned, feloniously assaulted, cut and stabbed the deceased, and inflicted on him one mortal wound, of which mortal wound he on the same day died; this, we think, is a sufficient statement of the facts constituting the offense." By reference, however, to what purports to be a copy of the indictment, in the statement of the case, it will be seen that the indictment in that case alleged that the defendants, "in and upon one Abraham Hostetter, feloniously, willfully, and of their *malice aforethought*, did make an assault," etc. So that in that case no question could have been raised as to the omission of the words "malice aforethought," because they were not omitted. And it was not to that question the remarks above quoted were directed.

Bishop says, it is believed that there are no substitutes for the words "malice aforethought" (2 Cr. Procedure, 335). In this State it has been held that there are (*People v. Vance, supra*). But here it is held that words equivalent in their import must be substituted, and in the information before us neither "malice aforethought" nor words equivalent thereto in their import are used. This, according to all the authorities, is a fatal omission, and the judgment must be reversed.

Judgment reversed and cause remanded for further proceedings.

We concur: Thornton, J., Morrison, C. J., Ross, J.

DEPARTMENT No. 1.

[Filed December 15, 1882.]

No. 8664.

MONTGOMERY, RESPONDENT,

VS.

MERRILL ET AL., APPELLANTS.

INSOLVENCY—MORTGAGE—ACTION—STAY OF PROCEEDINGS—LIEN—EQUITY—FORECLOSURE—DEFICIENCY. After execution of the mortgage in suit the mortgagor was adjudged insolvent and a stay of proceedings ordered. No judgment herein was asked for any deficiency after a sale of the mortgaged premises on foreclosure. *Held*, the insolvency proceedings constituted no bar to plaintiff's right to proceed to foreclose his mortgage lien.

ID.—ID.—PRESUMPTION—ORDER. If the order in insolvency staying proceedings could be construed as having any effect upon the right of plaintiff to sue for foreclosure, the Court that made it had jurisdiction to modify it or set it aside in favor of a mortgage creditor, so as to permit him to proceed by action on the equity side of the Court to foreclose; and the presumption is that the "stay" was so modified or set aside as to plaintiff because the complaint avers, and it is not denied, that "the action was brought by leave of the Court first had and obtained."

ID.—ANSWER—HOMESTEAD—PLEADING—JUDGMENT. The answer of defendants admitted the allegations of the complaint, but affirmative matter as to the insolvency and a declaration of homestead was set up in bar of plaintiff's action. As to the homestead the answer averred: "That on the — day of —, A. D. 18—," the defendant, as head of a family, had acquired a homestead interest in the mortgaged premises, by making, acknowledging and filing, according to law, "on that day," a declaration of homestead upon the premises. *Held*, the answer did not affirmatively show any existing claim, which had attached prior to the mortgage lien. Taken in connection with the admission by defendants of the allegations in the complaint that the "claim" asserted by defendants was subsequent and subject to the mortgage, the answer itself must be regarded as frivolous. It admitted every averment in the complaint and contained no defense; and the case was one in which it was proper for the Court to order judgment for plaintiff upon the pleadings.

Id.—ATTORNEY'S FEE—PRESUMPTION—JUDGMENT—RECITALS. It was the duty of the Court to fix the amount of the attorney's fee. (Stats. 1873-4, p. 707.) Presumably the Court discharged that duty. The judgment rendered recites that there was due the amount stated for principal and interest upon the mortgage debt, and \$188.65 for an attorney's fee provided in the mortgage; and the judgment to that effect was according to the allegations and prayer of the complaint.

Id.—Id. In the absence from the record of anything to the contrary, it must be presumed by the appellate Court that the Court below proceeded regularly in fixing the amount of the attorney's fee, and that the judgment is, in all respects, correct.

Appeal from Superior Court, Colusa County.

J. T. Harrington, for appellants.

H. M. Alberry, for respondent.

McKEE, J., delivered the opinion of the Court:

This appeal is taken on the judgment-roll, from a final judgment entered on the pleadings in the case. The judgment was entered in an action commenced December 8, 1881, to foreclose a mortgage given to secure payment of a promissory note and a counsel fee, at the rate of 5 per cent. upon the principal and interest due upon the note in case of foreclosure. In the complaint it was alleged that the wife of the mortgagor, who was named in the complaint as a party defendant, had, or claimed to have, some interest in or lien upon the mortgage premises, which she claimed to have acquired subsequent and subject to the mortgage lien; and that, since the execution of the mortgage, the mortgagor had become insolvent, and, therefore, against him no judgment was asked for any deficiency after a sale of the mortgage premises. By the answer of the defendants all the allegations of the complaint were admitted; but it was affirmatively averred that the mortgagor had been adjudicated insolvent on October 29, 1881, and that all proceedings against him, as an insolvent debtor, had been stayed. Also, that on the—day of—, A. D. 18—, "the defendant, as head of a family, had acquired a homestead interest in the mortgage premises, by making, acknowledging and filing, according to law, "on that day," a declaration of homestead upon the premises.

Upon these pleadings the Court on motion gave judgment in favor of the plaintiff, according to the prayer of his complaint, for the amount of the principal and interest of the mortgage debt, and \$188.65, "attorney's fee provided in the mortgage" and costs; and to this no exception was taken by the defendants. But it is contended that the judgment is erroneous, because the answer contained matter which operated as a bar to the maintenance of the action.

The adjudication of the defendant's insolvency did not constitute a defense to the action, nor did the existence of a stay of all proceedings against the insolvent debtor have that effect. The action was not brought against the insolvent to recover a money judgment upon the debt; it was brought to obtain a decree of foreclosure and sale of the mortgaged premises for the satisfaction of the debt. As a creditor of the insolvent debtor, having a mortgage lien, the plaintiff had the right when the mortgagor was adjudged insolvent, to look to the mortgage alone, or to prove the mortgage debt against the estate of the insolvent, pursuant to the provisions of Section 44 of the Insolvent Act. (Stats. 1880, p.92.) According to those provisions a mortgage creditor of an insolvent debtor is not permitted to prove his debt in whole, unless he releases or transfers his mortgage to the assignee in insolvency; nor in part, unless he agrees with the assignee upon the value of the mortgage premises, and the value should be less than the mortgage debt; or unless he agrees that a sale of the mortgage premises may be made, under an order of the Court, "in such manner as the Court may direct;" in such cases he will be admitted to prove any deficiency. Or if he releases or transfers his mortgage to the assignee, he will be admitted to prove the entire debt and share in the administration of the assets. But unless the value of the mortgage premises shall be ascertained by agreement, or the property itself shall be sold under the directions of the Court, or the mortgage shall have been released or transferred to the assignee in insolvency, it is not permissible for the mortgage creditor to prove his debt in whole or in part, nor to maintain any action against the insolvent debtor for the collection of his debt. Such an action would be against the policy of the insolvent law and in violation of the order of the Court, which stayed all proceedings against the insolvent debtor. Yet as the assignee in insolvency takes only such interest and rights as the insolvent debtor had in the mortgage premises, subject to the mortgage, the insolvency proceedings do not affect the right of the mortgagee to foreclose his lien; and in this case the mortgagee relied wholly on his mortgage lien. By his complaint he waived personal judgment for any deficiency which might be remaining after execution of a foreclosure and sale; he, therefore, had no debt or claim proved or provable against the estate of the insolvent debtor, and as his action was not to enforce the collection of his debt out of the assets of the estate, it could not interfere with the insolvency proceedings, and the order staying all proceedings against the estate did

not operate to prevent the plaintiff from maintaining the action.

But if the order could be construed as having any effect whatever upon the right of the plaintiff to sue for foreclosure, the Court that made the order had jurisdiction to modify or set it aside in favor of a mortgage creditor, so as to permit him to proceed by action on the equity side of the Court to foreclose; and the presumption is that the "stay" was so modified or set aside as to the plaintiff, because the complaint avers, and it is not denied, "that the action was brought by leave of the Court first had and obtained." The stay of proceedings, therefore, in no way affected the right of the plaintiff to maintain his action, nor did it operate to postpone the action pending the insolvency proceedings.

Nor did the answer otherwise disclose any defense to the action, or contain any matter which would defeat or delay the action. The new matter, by which the defendants attempted to assert a homestead claim or interest in the mortgage premises, was not well pleaded; it did not affirmatively, or otherwise, show any existing claim, which had attached prior to the mortgage lien. Taken in connection with the admission by the defendants of the allegations in the complaint that the "claim" asserted by the defendants was subsequent and subject to the mortgage, the answer itself must be regarded as frivolous—it admitted every averment in the complaint, and contained no defense; and the case was one in which it was proper for the Court to order judgment for the plaintiff upon the pleadings. (*Hemme v. Hays*, 55 Cal. 337.)

And in adjudging that the plaintiff was entitled to the sum awarded for an attorney's fee, as provided in the mortgage, there appears no error. It was the duty of the Court to fix the amount of the attorney's fee. (Stat. 1873-74, p. 707.) Presumably the Court discharged that duty. The judgment rendered recites that there was due the amount stated, for principal and interest, upon the mortgage debt, and \$188.65 for an attorney's fee, provided in the mortgage, and the judgment to that effect was according to the allegations and prayer of the complaint in the case. There is no bill of exceptions or statement on appeal, and, in the absence from the record of anything to the contrary, it must be presumed by the appellate Court that the Court below proceeded regularly in fixing the amount of the attorney's fee, and that the judgment is, in all respects, correct. (*Hustings v. Cunningham*, 35 Cal. 550.)

Judgment affirmed.

We concur: Ross, J., McKinstry, J.

IN BANK.

[Filed January 12, 1883.]

No. 10,802.

EX PARTE COX, ON HABEAS CORPUS.

VITICULTURE — LEGISLATIVE POWER — MISDEMEANOR. For the purpose of local legislation, legislative functions may be conferred upon municipal corporations, but the Act relating to the Viticultural Commissioners (Stats. 1881, p. 51) is in no sense a conferring of powers for municipal purposes.

Id.—Id. The Legislature had not authority to confer upon the Viticultural Health Officer or Board the power of declaring what acts should constitute a misdemeanor.

Young & Young, for petitioner.

Anderson, Tuska, and Dwinelle, contra.

By the COURT:

The petitioner was convicted of a misdemeanor, consisting of the violation of a rule and regulation of the Board of State Viticultural Commissioners. The powers attempted to be exercised by the officer and Commissioners are specified in the Act of March 4, 1881. (Stat. 1881, p. 51.)

The Act declares that the officer shall have power, subject to the approval of the Board, to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of, restrain, or prohibit, the importation into the State, and the distribution and disposal within the State, of infected vines, cuttings, and empty fruit-boxes, etc.; the Act also declares that a willful violation of the quarantine regulations of the Board shall be a misdemeanor.

For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the Act before us is in no sense a conferring of powers for municipal purposes. The Legislature had not authority to confer upon the officer or Board the power of declaring what acts should constitute a misdemeanor. The legislative power of the State is vested in the Senate and Assembly. (Const., Art. IV. Sec. 1.) That power could not, as to the case before us, be delegated to the officer or Board. The Act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and Board the power to so declare. (Cooley on Const. Lim. p. 141, and cases cited.)

The petitioner is discharged.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 7415.

MARTEL, RESPONDENT,

v.

MEEHAN, EXECUTOR, ETC., APPELLANT.

UNLAWFUL DETAINER—EXECUTOR—ESTATE—TENANT. The executor of a last will and testament of a decedent, who in his life-time was a tenant, cannot be proceeded against by summary remedy under Section 1161 C. C. P. for unlawfully holding over.

Id.—Id. It is only when the tenant continues in possession "in person or by sub-tenant" that the action can be maintained.

Id.—DAMAGES—PENALTY. There is no good reason why the language of the Code should be strained so as to uphold a judgment against an estate, in the nature of a penalty, for *three times* the amount which would be due for rent if the tenant had lived.

Appeal from Superior Court, San Francisco.

A. A. Pardow, for appellant.

Cobb and Nicholson, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action was brought under the chapter of the Code of Civil Procedure which treats of summary proceedings for obtaining possession of real property.

The complaint alleges that on or about the 20th of May, 1879, plaintiff, by a written agreement and lease, leased, demised and let to William Meehan, now deceased, certain premises (described) in the city and county of San Francisco: "To have and to hold said premises to the said William Meehan, now deceased, at the monthly rent of two hundred dollars, payable monthly, in advance, on the 10th day of each and every month thereafter in advance, in gold coin of the United States." That on the 27th day of September, 1879, William Meehan died testate. That his will was duly probated, and letters testamentary on his will were duly issued to said James Meehan on the 13th of February, 1880, who, on that day, duly qualified and still is executor of the estate. That James Meehan, "executor as aforesaid," is plaintiff's tenant of the premises, and defendant Jacob L. Solomon is a sub-tenant therein, and occupies a portion thereof.

That by virtue of said agreement and lease William Meehan, now deceased, entered into the possession and occupation of said demised premises, and said James Meehan, executor of the estate of the said William Meehan, deceased, continues to hold the same as tenant of said plaintiff; and

said Jacob L. Solomon continues to hold as a sub-tenant of said James Meehan, executor as aforesaid, and is in occupation of a portion of said premises. That, pursuant to the terms of said agreement and lease, there became due on the 10th day of February, 1880, from said defendant James Meehan, the executor of the estate of said William Meehan, deceased, to said plaintiff, for rent of said premises, the sum of \$950, gold coin, (being aggregate of rents due from October 10, 1879, to February 10, 1880.)

That on the 17th day of February, 1880, notice and demand in writing was duly given and made by said plaintiff to said defendants, and for and requiring the payment of said rent then due, amounting to the said sum of \$950, or the possession of said demised property, but said defendants neglected and refused for the space of three days after notice and demand so given and made, and still neglect and refuse to pay said rent or surrender possession. That James Meehan, executor as aforesaid, unlawfully holds over, etc., by reason whereof plaintiff has sustained damages in the sum of \$950, etc.

The prayer of the complaint is that plaintiff have restitution of the premises and judgment "against said James Meehan, executor as aforesaid," for the sum of \$950, amount of rent due and for accruing rents; that the amount found due "may be trebled," and also for costs, etc., and that said lease "under which said James Meehan, executor of the estate of William Meehan, deceased, holds, be forfeited."

The defendant, James Meehan, executor, demurred to the complaint on the grounds: 1. The Court has no jurisdiction of the subject-matter, or (2) of the person of the defendant. 3. The complaint does not state facts sufficient, etc. 4. A defect of parties defendant; an executor cannot be made defendant in an action in forcible or unlawful entry or detainer. 5. Misjoinder of parties defendants for the reason stated in (4).

Section 1161 of the Code of Civil Procedure reads: "A tenant of real property for a term less than life is guilty of unlawful detainer; * * * 2. Where he continues in possession, *in person or by sub-tenant*, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice in writing," etc.

Prior to an amendment of the statute by the insertion of the words "or the successor in estate of his landlord," it was held that the right to remove a tenant by summary proceed-

ing like the present was conferred upon the conventional landlord alone, and not upon his successor in the estate. (*Reay v. Cotter*, 29 Cal. 168.) The proceeding is statutory and can be resorted to only in the cases, and by and against the parties, mentioned in the statute. The executor of the last will and testament of a decedent, who in his life-time was tenant, is not such person or a sub-tenant. Yet it is only when the tenant continues in possession "in person or by sub-tenant" that the action can be maintained.

Such is the letter of the section of the Code. The landlord when he lets his property must be presumed to anticipate the possible contingency of a tenant's death during the term of the lease, and to know, in that event, he will not be entitled to resort to the extraordinary remedy here asserted. There is no good reason why the language of the Code should be strained so as to uphold a judgment against an estate, in the nature of a penalty, for *three times* the amount which would be due for rent if the tenant had lived.

The demurrer should have been sustained.

Judgment reversed and cause remanded, with directions to sustain demurrer to complaint.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed January 16, 1883.]

No. 8583.

MORAN, RESPONDENT,

v.

ABBEEY ET AL., DEFENDANTS, (HEFFNER, APPELLANT.)

PROMISSORY NOTE—EVIDENCE—SURETY—PAYMENT—PURCHASE—CONTRACT—

PERFORMANCE. The principal subject of controversy was whether the transaction by which plaintiff obtained possession of the note in suit amounted to a purchase or payment of it. Upon the facts, it is held the obligation of appellant as surety upon the note was extinguished. When plaintiff, at the request of Abbey, the principal maker, and for his benefit, took up the note, the contract was discharged, and the qualified indorsement of it by the payee, three years afterward, was ineffectual as a transfer. There was no sale of the note, and no obligation on the part of the payee, arising out of the transaction, which entitled the plaintiff to a transfer. As a friend of Abbey, and at his request, plaintiff advanced the money to take up the note. He and Abbey were the only parties to that transaction. The legal effect of it was to extinguish the obligation of the note, and the only obligation which arose from the transaction was on the part of Abbey.

Id.—Id. Payment of a promissory note is not a contract; it is a performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or any one in his behalf, and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty. The duty being discharged, the right ceases to exist, and the contract itself, though preserved in form, is no longer the subject of sale or transfer.

Id.—TESTIMONY. A witness had given testimony tending to prove that Abbey, the maker of the note, and the plaintiff came together to the bank, where the note had been left for collection, to take up the note, and that the witness, after receiving from the plaintiff the money due upon the note, surrendered it. Upon being asked, "To whom?" he answered: "I supposed I was surrendering it to Abbey." It was that answer which the Court, upon motion of the plaintiff, refused to strike out. *Held:* The ruling, if error, was not a substantial one. The fact in question was the person to whom the note was surrendered, after the money for it had been paid. All the facts and circumstances attending the entire transaction had been given in detail by the witness; and, after his answer as to the surrender of the note, he testified that he received the money for the note from the plaintiff, and upon receipt of the money, laid the note upon the counter for the party to take possession of it; and his impression was that the plaintiff took it up from the counter, and he and Abbey then went away. This left the question, upon the circumstances connected with it, for the jury, whose duty it was to draw the proper inferences from them, and the plaintiff had the full benefit of the proof. So that if there was any error in the refusal to strike out the answer, it was harmless, and would not justify directing a new trial.

Id.—VERDICT—INSTRUCTIONS—NEW TRIAL—ERROR. In the charge of the Court to the jury there was no substantial error. Considered as a whole, in connection with the evidence and the pleadings, and construed with reference to the subject-matters in controversy, and the claims of the parties before the Court, it was substantially correct. It fairly presented the case to the jury, and there was nothing in it calculated to mislead the jury.

Id.—Id.—NEWLY-DISCOVERED TESTIMONY. A new trial will not be granted because new evidence has been found which was known to a witness at the trial of the case, and might have been obtained from him by due attention.

Id.—LEADING QUESTIONS—DISCRETION—APPEAL. A verdict should not be set aside for the reason that leading questions, although objected to, have been allowed to be put to a witness. The reason is that the examination of a witness in the trial of a case is a matter within the sound discretion of the trial Court, who may, in the exercise of that judicial discretion, allow or disallow leading questions (Secs. 2044-46, O. C. P.)

Id.—Id. A matter resting on judicial discretion is not reviewable in an appellate Court; it is only the abuse of such discretion of which the Court will take cognizance.

Id.—EVIDENCE—RECORD. It was urged that the Court erred in permitting the defendant, against the objections of plaintiff's counsel, to cross-examine the plaintiff upon matters of record, without producing the record itself. *Held:* The objections made were not tenable, because the cross-examination related to the testimony which, it was claimed, the plaintiff had given while under examination in a Court of record, and not to any record of the Court, and the testimony was relevant to the issues.

Id.—Id. It was not error for the Court to strike out the oral statement of plaintiff in response to his counsel, as to the determination by the Bankruptcy Court of the contest between him and the creditors of Abbey. Whatever judgment or order had been made by that Court, as the result of the plaintiff's examination, in awarding to the plaintiff the property involved in that contest, was a matter of record provable only by a production of the record itself.

Appeal from Superior Court, Butte County.

Burt, Turner & Hamilton, for appellant.

Gray & Gale, for respondent.

McKEE, J., delivered the opinion of the Court:

This case has been before the Courts on a former appeal (58 Cal. 165). Upon the going down of the remittitur from the decision then rendered, a retrial was had in the lower Court, which resulted in a verdict for the defendant Heffner; but upon a motion for a new trial made by the plaintiff, upon a statement of the case and two affidavits of newly-discovered evidence, the Court set aside the verdict. Whether that was done upon the grounds of newly-discovered evidence, or of any of the specifications of error contained in the statement, does not appear by the record.

But the newly-discovered evidence related to an alleged conversation between the plaintiff and Heffner about the promissory note upon which the action was brought; and the affidavits concerning it were made by the plaintiff himself and one Wilson, both of whom had testified as witnesses in this case. In his affidavit the plaintiff deposes to "absolute forgetfulness" of the conversation, until it had been recalled to his memory by Wilson, after the rendition of the verdict. Wilson, however, had not forgotten it, and could have testified to it at the trial, if he had been questioned at all about the subject; but he was not. Yet, as the evidence was obtainable by the exercise of ordinary diligence, the neglect or omission of the plaintiff to draw it from the witness by a proper course of examination is no ground for a new trial. It is well settled that a new trial will not be granted because new evidence has been found which was known to a witness at the trial of the case, and might have been obtained from him by due attention. (*Bond v. Cutler*, 7 Mass. 205; *McIntyre v. Young*, 6 Blackf. 406.)

The issues in the case which were submitted to the jury comprised "payment and satisfaction" of the note in suit, and fraud in obtaining a qualified indorsement of the note from the payee after it had been paid; and it is urged that the verdict of the jury was properly set aside, because of errors committed by the Court during the trial of the cause in overruling objections to the questions propounded to witnesses,

in admitting and excluding testimony, and in giving instructions to the jury.

Four or five specifications of error relate to rulings made by the Court in denying objections by counsel for plaintiff to leading questions asked by counsel for Heffner, in the direct examination of his witnesses. But these are not errors for which a new trial will be granted. We are not aware of any case in which a verdict has been set aside for the reason that leading questions, although objected to, have been allowed to be put to a witness. (*Green v. Gould*, 3 Allen, 466; *Hopkinson v. Steel*, 12 Vt. 582; *Parsons v. Huff*, 38 Me. 137, *Mershon v. Hobensack*, 22 N. J. 372.) And the reason is that the examination of a witness in the trial of a case is a matter within the sound discretion of the trial Court, who may, in the exercise of that judicial discretion, allow or disallow leading questions. (Secs. 2044-46 C. C. P.) A matter resting on judicial discretion is not reviewable in an appellate Court; it is only the abuse of such a discretion of which we will take cognizance. In this case no such question is presented by the record.

It has also been urged that the Court erred in permitting the defendant, against the objections of plaintiff's counsel, to cross-examine the plaintiff upon matters of record, without producing the record itself. But the objections made were not tenable, because the cross-examination related to the testimony which, it was claimed, the plaintiff had given while under examination in a Court of record, and not to any record of the Court. The cross-examination had developed the fact that Abbey, the principal maker of the note in suit, had been adjudicated a bankrupt before the maturity of the note; that the plaintiff had become possessed of all the available property of bankrupt before the act of bankruptcy; and that he had been cited to appear in the Bankruptcy Court to answer under oath what property or effects of the bankrupt he had in his possession or under his control; and the object of the cross-examination objected to evidently was to show that the plaintiff had, while under examination in the Bankruptcy Court, produced or presented the promissory note in suit to that Court, and testified that he had paid it for Abbey at his request. As sworn statements or admissions of the plaintiff relevant to the issues of payment and fraud, which were on trial, the evidence was proper, and the examination of the plaintiff for that purpose was unobjectionable.

Nor was it error for the Court to strike out the oral statement of the plaintiff in response to his counsel as to the de-

termination by the Bankruptcy Court of the contest between him and the creditors of Abbey. Whatever judgment or order had been made by that Court, as the result of plaintiff's examination, in awarding to the plaintiff the property involved in that contest, was a matter of record provable only by a production of the record itself.

The next exception which is the subject of a specification of error relates to the refusal of the Court to strike out the answer of a witness to a question which had been put to him. The witness had given testimony tending to prove that Abbey, the maker of the note, and the plaintiff came together to the bank, where the note had been left for collection, to take up the note, and that the witness, after receiving from the plaintiff the money due upon the note, surrendered it. Upon being asked "To whom?" he answered: "I supposed I was surrendering it to Abbey." It was that answer which the Court, upon motion of the plaintiff, refused to strike out.

The ruling, if error, was not a substantial one. The fact in question was the person to whom the note was surrendered, after the money for it had been paid. All the facts and circumstances attending the entire transaction had been given in detail by the witness; and after his answer as to the surrender of the note, he testified that he received the money, laid the note upon the counter for the party to take possession of it, and his impression was that the plaintiff took it up from the counter, and he and Abbey then went away. This left the question upon the circumstances connected with it, for the jury, whose duty it was to draw the proper inferences from them, and the plaintiff had full benefit of the proof. So that if there was any error in the refusal to strike out the answer, it was harmless, and would not justify directing a new trial.

This brings us to a consideration of the grounds of litigation in the case as it was submitted to the jury, under the instructions of the Court. As has been already stated, the principal subject of controversy was, whether the transaction by which the plaintiff obtained possession of the note in suit, amounted to a purchase or payment of the note. The note was given on the 30th of December, 1875, payable one year after date, to the order of John Hancock, at the banking house of Rideout, Smith & Co., in Oroville, and was left by the owner in the bank for collection. Before it matured, Abbey, the principal maker of the note, had turned over, by sale or otherwise, all his available property to the plaintiff; this property comprised 160 acres of land, upon which Abbey resided with his family, 1600 head of sheep, including

seven hundred head which belonged to his wife, 75 hogs, and "10, 15, 20 or 30 tons of hay;" and on October 24, 1876, Abbey became a voluntary or involuntary bankrupt. But his creditors had attached the property which had been turned over to plaintiff, and between them and him a contest arose, in which he was cited to appear in the Bankruptcy Court for examination, under oath, touching the property or effects of Abbey, which he had in his possession or under his control. Before he appeared in obedience to the citation, he obtained possession of the note in suit. In getting it he knew all about the note, the parties to it, and the legal relations existing between them. He himself testified that he knew—and it was admitted at the trial of the case—that the note had been given to secure payment of a sum of money which Abbey had borrowed for his exclusive use and benefit, that Heffner signed it as a joint-maker for the accommodation of Abbey, and that, as between Hancock, the payee of the note, and Abbey, Heffner was a surety only. Knowing these things, and having acquired from Abbey possession of the property about which he was engaged in a contest with the creditors of Abbey, the plaintiff, before appearing in the contest, entered into a transaction with Abbey about the note, which is best shown by his own testimony: "A few days before the transaction Abbey spoke to me about taking up the note. He told me there was a note in the bank made by him, and that he was trying to raise money, but had failed, and asked me if I had any money to loan. I told him I had. He says he would like to get that note out of the bank before any costs would be put on him. * * * I took up the note at his request. I knew Hancock, the payee of the note. I did not go to see him about purchasing it. * * * I went to the bank without seeing Hancock, the owner of the note, at all, and took the note out of the bank. * * * I paid the note, took possession of it, took it home, put it into my safe, and let it lay there three years, until, before commencing this suit, I went, upon the advice of my lawyers, and got Hancock to indorse it. At first Hancock refused to indorse, because he had got his money, but afterward, on being assured that a qualified indorsement would not injure him, he consented.

From this testimony alone it is evident that in the transaction there was no concurrence or privity on the part of the payee of the note and the plaintiff. Both were, as to the transaction, strangers to each other. There was, therefore, no sale of the note, and no obligation on the part of the payee, arising out of the transaction, which entitled the

plaintiff to a transfer. As a friend of Abbey, and at his request, the plaintiff advanced the money to take up the note. He and Abbey were, therefore, the only parties to that transaction. The legal effect of the transaction was to extinguish the obligation of the note; and the only obligation which arose from the transaction was on the part of Abbey.

It has been argued, however, that "if there was no contract of sale by reason of a want of mutual consent between the plaintiff and the payee of the note, then, for the same reason and under the same rule of law, there was no payment; and that it follows, as a necessary conclusion, that the note, being neither paid nor purchased, still existed, and belonged to Hancock until he indorsed it to the plaintiff."

But payment of a promissory note is not a contract; it is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or any one in his behalf and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty. The duty being discharged, the right ceases to exist; and the contract itself, though preserved in form, is no longer the subject of sale or transfer. When, therefore, the plaintiff, at the request of Abbey and for his benefit, took up the note, the contract was discharged, and the qualified indorsement of it by the payee, three years afterward, was ineffectual as a transfer. The verdict of the jury was, therefore, according to the evidence and the law.

In the charge of the Court to the jury we find no substantial error. Considered as a whole, in connection with the evidence and the pleadings, and construed with reference to the subject-matter in controversy, and the claims of the parties before the Court, it was substantially correct. It fairly presented the case to the jury, and there was nothing in it calculated to mislead the jury. There was, therefore, no grounds for a new trial.

We concur: McKinstry, J., Ross, J.

IN BANK.

[Filed January 16, 1883.]

No. 7548.

BURDETT, RESPONDENT, vs. MCBROWN, APPELLANT.

CONFLICT OF EVIDENCE—APPEAL.—Where there is a substantial conflict of evidence, the judgment will be affirmed.

Appeal from Superior Court, San Francisco.

W. H. Tompkins, for appellant.

McElrath & Eells, for respondent.

By the COURT:

A single question of fact was involved in the trial of this case upon which there was a substantial conflict of evidence. Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 29, 1883.]

No. 8676.

ESTATE OF KELLY.

ESTATE—APPEAL—LEGACY—EXECUTRIX—DISTRIBUTION. An executrix may appeal from an order of partial distribution by virtue of Sec. 1660 C. C. P., which declares that she may resist the application.

Appeal from Superior Court, Yolo County.

J. H. McKune, for appellant.

F. E. Bates, for respondent.

By the COURT:

This is an appeal from an order of partial distribution, made under Sections 1658 to 1661 C. C. P. The appeal is taken by the executrix.

First. The point made that the executrix cannot be heard to question the propriety of the order, or to appeal therefrom, is answered by Section 1660, which declares that the executrix may resist the application.

Second. The Court, after a hearing, found that prior to May 1, 1882, funds had come to the possession of the executrix sufficient to pay all the debts known to the executrix, and all the debts, charges and expenses of administration which had occurred prior to April 4, 1882, together with the legacies of the first class, and that since that time the further sum of \$7,000 had come to her hands; that the legacies to the petitioners could be paid without loss to creditors or injury to the fund necessary to pay the expenses of administration accrued and to accrue. The case comes to us on appeal from the order without the evidence. We cannot see that any error was committed. The Court had jurisdiction of the parties and of the subject-matter, and the proceedings seem to be in strict conformity to the sections above referred to.

Order affirmed.

DEPARTMENT No. 1.

[Filed January 25, 1883.]

No. 7451.

SHARPSTEIN, RESPONDENT,

v.

FRIEDLANDER, APPELLANT.

RES JUDICATA—TRUST—EXECUTRIX—NOTE. The decision upon a former appeal (54 Cal. 58) held, the law of the case.

Appeal from Fifteenth District Court, San Francisco.

Doyle, Barbour & Scripture, for appellant.

McAllister & Bergin, for respondent.

By the COURT:

When this case was before the late Supreme Court, on a former appeal from a judgment upon demurrer to the complaint in the action (54 Cal. 58), the Court announced as the law of the case that the plaintiff had the right to elect to regard the two promissory notes, which constituted the subject-matter of the agreement upon which the action was founded, as constituting one entire fund, and to take, as his share of the fund, the unpaid note which had come into the hands of the defendant, who claimed to hold it as executrix of the estate of Isaac Friedlander, deceased. Defendant therefore held the note for the benefit of the plaintiff, and the action was maintainable against her personally, and not as representative of the estate of Friedlander.

That decision has been challenged on the argument of this appeal; but, whatever opinions may be entertained of the original question involved in the action in which the decision was rendered, the decision itself must be regarded as a final determination of the rights of the parties to the promissory note, which was the subject-matter in suit. The plaintiff was entitled to it or its proceeds if collected by the defendant. Holding the note, as she did, in trust for the benefit of the plaintiff, the defendant had no authority to deal with it as her own, or as an asset of the estate of which she was executrix; she could not use it in payment of her own debt, or of any claim against the estate. Hence, when she, instead of discharging her trust by surrendering the note to the plaintiff, collected it from the maker, she became personally liable for the proceeds thereof; and she was not entitled to offset the amount by any claim which the maker of the note might have had against the estate.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 23, 1883.]

No. 8627.

KING, RESPONDENT, v. FELTON, APPELLANT.

ASSIGNMENT—INSOLVENCY—ACCOUNTING—DEMURRER—MISJOINDER—PARTIES.

The demurrer in this case should have been sustained because of misjoinder of parties defendant, and because the complaint did not state facts sufficient to constitute a cause of action.

Appeal from Superior Court, San Bernardino County.

Waters & Gibson, for appellant.*Willis and Rowell*, for respondent.

By the Court:

The demurrer of the defendant Felton should have been sustained.

First. There was a misjoinder of parties defendant. From the case as presented by the complaint it is not apparent to us why either the Riverside Land and Irrigating Company or S. C. Evans was joined with the defendant Felton. There is no statement of facts showing that either of them was a necessary or proper party; the facts stated apply alone to Felton as a defendant. The demurrer was sustained as to the Riverside Land and Irrigating Company; it should have been sustained as to Evans.

Second. The complaint does not state facts sufficient to constitute a cause of action. The plaintiff sues as assignee in insolvency of one Sayward.

There is no averment that an assignment was ever made. Section 17 of the Insolvency Act of 1880 requires that an assignment of the insolvent's property shall be executed, which assignment shall vest the title of the property in the assignee. It is alleged in the complaint that Sayward "is now the owner," etc. If, at the time of commencing the action, Sayward was the owner, the plaintiff was not; if, on the other hand, an assignment had been properly executed, Sayward was not the owner, and plaintiff was.

Other errors appear in the transcript, such as insufficiency of findings on the issues presented; but as the case is here determined on the pleadings, those errors are not for decisive consideration.

Judgment reversed and cause remanded, with instructions to sustain the demurrer of the defendant Felton, with leave to plaintiff to amend.

DEPARTMENT No. 2.

[Filed January 24, 1883.]

No. 7517.

MERRILL, APPELLANT,

v.

WILLIAMS ET AL., RESPONDENTS.

CONTRACT — AGENT — CHARTER PARTY — SHIP — LIEN — OBLIGATION. The agreement in this case held not to impose any personal liability on defendants. It merely amounted to a stipulation on their part that in case no claim or lien should be established in favor of a ship, they, as agents thereof, would relinquish all claim to moneys collected by and in the hands of one Ferris.

Appeal from Superior Court, San Francisco.

George B. Merrill, for appellant.

W. H. L. Barnes, for respondents.

By the COURT:

It appears from the complaint that this action is upon the following agreement in writing, signed by plaintiff's assignors and defendants:

"1. To ascertain the amount received by Ferris from inward freight on the *Tartar*.

"2. To ascertain the amount collected on account of general average by Ferris.

"3. To ascertain the amount due charterers, under general average, for coals jettisoned during the voyage from Australia to San Francisco.

"These above amounts being ascertained, W., B. & Co., agents for owners, do agree with J. C. M. & Co., that in case it shall be determined that the owners of the *Tartar* have no lien or claim prior to Merrill & Co., under the charter party, to said moneys, the same shall be paid over to J. C. M. & Co., in satisfaction of so much of any judgment J. C. M. & Co. may recover against the Austral. & Am. M. S. S. Co. or said *Forbes et al.*, now in suit in the 12th District Court (case 18,308)."

Defendants had judgment in the Court below, and we think the proceeding should be sustained.

The contract did not impose any personal liability upon the defendants, but was simply an agreement on their part that in a certain event moneys in the hands of Ferris should be paid over to Merrill & Co. As the agents of the *Tartar*, defendants agreed, "in case it shall be determined that the owners of the *Tartar* have no lien or claim prior to Merrill &

Co., under the charter party, to said moneys, the same shall be paid over to J. C. M. & Co." Paid over by whom? Not by defendants, because they did not have the money. The contract merely amounts to a stipulation on the part of the defendants that in case no claim or lien should be established in favor of the ship, the defendants, as the agents thereof, would relinquish all claim to moneys collected by and in the hands of Ferris.

Judgment affirmed.

IN BANK.

[Filed January 9, 1883.]
No. 10,730.

PEOPLE, RESPONDENT, VS. GARCIA, APPELLANT.

DYING DECLARATIONS—EVIDENCE—WITNESS. It is not necessary that each witness testifying to a dying declaration shall also by his testimony definitely fix the belief of the declarant; the sense of impending death may be shown by one witness and the declaration by another.

ID.—ID. The statement "In case you turn me I will die," taken with the other testimony, did not tend to show a hope or expectation of recovery.

ID.—ACCOMPLICE—DECLARATIONS—KNIFE. The ruling as to the evidence of the witness Easley was not prejudicial to defendant. (McKinstry, J., and Ross, J., dissenting.)

NOTE.—As to the ruling on the evidence of the witness Easley, the following is inserted:

Three persons, Olivas, Soso, and defendant Garcia, were charged with the murder of one Estanislau. Separate trials were had. The Court overruled defendant's objections to the testimony of Easley as to declarations made by Olivas, and as to the actions of the latter. The declarations were made at the time Easley arrested Olivas, and after the completion of the murder, that he (Olivas) had lost his knife some weeks before, and that when he came into town, one Mrs. O. brought the knife (a large bowie) and gave it to him, and he did not know how the blood-stains came on it. Easley then told Olivas that Soso had told all about the killing, and that Garcia had done it, and that Soso and Olivas were present. Olivas then said he went to bed the night of the murder at O.'s house, and the next morning when he got up, Soso brought the knife and gave it to him bloody. Defendant objected that no connection was shown between him and the knife or Olivas, and that he, defendant, was not bound by statements of Olivas made in his absence.

Appeal from Superior Court, Ventura County.

Hall & English, Bledsoe & McKeeby, and Oglesby, for appellant.

Attorney-General Hart, for respondent.

By the COURT (McKinstry, J., and Ross, J., dissenting):

The objection that it does not appear that the declaration of the deceased as to the person who inflicted the wound was made under a sense and belief of impending death, is not

well taken. At least one witness testified that he stated, before any declaration regarding the infliction of the wound, that he would die; it is not necessary that each witness testifying to the declaration shall also by his testimony definitely fix the belief of the person making the declaration; the sense of impending death may be shown by one witness, and the declaration proved by another. The statement made to witness Elmore, "In case you turn me I will die," taken with the other testimony, does not tend to show a hope or expectation of recovery.

We see no error in the ruling as to the evidence of the witness Easley prejudicial to the defendant.

Judgment affirmed.

DISSENTING OPINION.

We dissent. We think the testimony of *Easley* as to statements of *Olivas* was clearly inadmissible.

McKinstry, J., Ross, J.

(Sharpstein, J., did not participate.)

DEPARTMENT No. 2.

[Filed January 30, 1883.]

No. 8796.

CLAFFEY, PETITIONER,

v.

HEAD, JUDGE, ETC., RESPONDENT.

BILL OF EXCEPTIONS — WAIVER — TIME. The Judge of the Court below declined to settle a bill of exceptions, holding he had no jurisdiction because of the lapse of time. On application for a writ of mandamus to compel him to settle and certify the same the writ was ordered, it appearing that the matter of the delay was one of accommodation between the attorneys of the respective parties; under the circumstances, all objections as to the presentment of the bill to the Judge should be deemed waived.

Mandamus.

E. A. Lawrence, for petitioner.

Gray & Haven, for respondent.

By the COURT:

In this cause we think that the writ must issue. The whole matter, as to the bill of exceptions, seems to have been one of accommodation between the attorneys of the respective parties, and, under the circumstances, we think all objections as to the presentment of the bill to the Judge should be deemed waived.

The writ to be issued, however, will direct the Judge of the Court below to settle the bill of exceptions referred to in the petition and answer, and certify the same, if on examination he should find it to be true and correct.

IN BANK.

[Filed January 29, 1883.]

No. 7552.

SAVINGS AND LOAN SOCIETY, RESPONDENT,

VS.

HORTON ET AL., APPELLANTS.

DEFAULT—DECREE—MORTGAGE. A decree *pro confessio* only concludes a party as to the averment in the bill, and does not amount to a confession of any fact not alleged in it.

COMPOUND INTEREST. The attention of the Court below is directed to Sec. 1919 C. C. in computing interest upon the interest which is not punctually paid.

Appeal from Superior Court, San Francisco.

Chase, Williams and Rhodes & Barstow, for appellants.

A. N. Drown, for respondent.

By the COURT (Thornton, J., and Myrick, J., dissenting):

Plaintiff filed a complaint to forelose a mortgage executed by defendant, and, no defense having been interposed, a default decree was entered in the case. On this appeal it was urged that the decree was for a larger amount than the complaint shows to have been due, and we think the point is well taken. Computing the interest claimed in the complaint, and adding thereto payments alleged to have been made by the mortgagee for taxes, it appears that the decree is for a larger sum than results from such computation.

It is contended by respondent that the difference may be accounted for by proof of payments made by the mortgagee in the shape of taxes and insurance on the mortgaged premises, after suit brought, but this assumption will not support the decree.

"A decree *pro confessio* only concludes a party as to the averments in the bill, and does not amount to a confession of any fact not alleged in it." (*De Leuw vs. Neely*, 71 Ill. 473;) and the same rule is found in Section 580 C. C. P.

The attention of the Court below is directed to Section 1919 of the Civil Code, in computing interest upon the interest which is not punctually paid. That section declares that the parties may agree that it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt. This appears to us to be the limit.

Judgment reversed and cause remanded.

IN BANK.

[Filed January 31, 1883.]

No. 7187.

MARKS, RESPONDENT, v. RYAN, APPELLANT.

FIXTURES—LEASE—LANDLORD AND TENANT—CONVERSION. A lessee, before the expiration of his term, erected a house and barn on the leased premises. At the expiration of the term a new lease was taken of the premises, without reserving the rights of the lessee to the buildings so erected. *Held*, the buildings became fixtures annexed to the land, and conversion therefor could not be maintained.

Id.—Id. The acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term.

Id.—DWELLING-HOUSE—BARN. In the absence of any agreement to the contrary, a dwelling-house and barn erected upon the land of his landlord by a tenant becomes a part of the realty.

Appeal from Fifteenth District Court, San Francisco.

McAllister & Bergin, for appellant.

Duprey & Hutchinson, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

By the assignment and specifications of error, we are confined to the consideration of the simple question, whether the buildings for the value of which the plaintiff recovered judgment in this action were the personal property of the plaintiff at the time of the alleged conversion of them by the defendant.

The Pacific Glass Works, a corporation, was the owner of the premises upon which said buildings were standing, and on the 18th day of December, 1867, executed a lease of said premises to one John Anderson for the term of one year, who, before the expiration of that term, erected upon said premises the house and barn in controversy. At the expiration of that term, said Pacific Glass Works made, and said John Anderson accepted, another lease of the said premises, which contains the following clause:

“And that at the expiration of the said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and the said party of the second part further covenants and agrees that during the occupancy of the said demised premises he will not put, nor suffer to be put thereon, nor use the same, or any part thereof, nor the buildings thereon, or to be erected

thereon, nor suffer the same to be used by any other person or persons, for the erection or working of any still, distillery, apparatus or appliances for the illicit or other distillery, or manufacture of spirituous or other liquors."

After that two other leases of the same premises were executed between the same parties, for the same rent, and on the same terms as that last above mentioned, differing from that only in dates and length of terms. The last of said leases is dated April 15th, 1875, and is for the term of two years. On the 17th day of July, 1875, Anderson executed what purports to be a conveyance of the house and barn in controversy to the plaintiff in this action. "At the time of the execution and delivery of said conveyance Annie Langstone was, and had been, for between two and three years, in occupation of the land, house and barn mentioned in the complaint, as tenant of said Anderson, paying him therefor during that time the monthly rent of \$25; and after the execution of said conveyance, the plaintiff duly notified her thereof, and thereafter the plaintiff collected rent of her therefor, \$25 per month, for one or two months, and \$20 per month thereafter, until about February, 1876, one John J. Haley notified her not to pay any more rent to plaintiff, but to pay the rent to Charles Crocker, to whom, he, Haley, said the land in the complaint described belonged."

Annie Langstone testified that she paid rent to the plaintiff five or six months, and that she then ceased paying rent to him because Mr. Haley notified her not to pay any more rent to plaintiff. After that she "paid rent to D. W. Parkhurst, the agent." At times to the defendant, i. e., when she did not have the rent when Mr. Parkhurst called, she had to go to the office and pay it to defendant.

On the 9th of March, 1876, Chester & Hyde, who had a contract with plaintiff to remove said buildings off of said lot, went upon the premises, and while making preparations to remove said buildings were handed the following:

"SAN FRANCISCO, March 9, 1876.

"To Edmund Marks, his employees, Hyde & Chester, House-movers, their Servants and Agents—NOTICE: You are hereby notified not to move, displace, or in any manner disturb a certain house situated on the Nuevo Potrero, and now occupied by Mrs. Annie Langstone. If you fail to take notice as above, and persist in removing said house, you will be prosecuted according to law.

"CHAS. CROCKER,
("By E. RYAN, Agent.")

After receiving this nothing more was done toward removing said buildings, and the plaintiff afterward commenced this action.

It is contended that defendant had no right or authority to interfere with the removal of said buildings. But that in our view of the case is not a material fact. If the plaintiff owned the buildings and had a right to remove them no one had any right to interfere. If he did not have a right to remove them, the defendant did not by reason of interfering in the manner and to the extent that he is shown to have interfered, rendered himself liable to pay for the buildings in an action for their conversion.

If we follow the case of *Merritt v. Judd* (14 Cal. 60), and *Jungerman v. Bovee* (19 *id.* 355), we must hold that the facts proven in this case are not sufficient to justify the finding "that said buildings were at the date last aforesaid (March 9, 1876,) the personal property of the plaintiff."

Neither of those cases is distinguishable in principle from this case. The earlier one certainly is not. According to the doctrine of those cases upon the execution of a new lease the lessee "is in the same situation as if the landlord, being seized of the land, had leased both land and fixtures to him." In that case we do not think that any one would claim that the lessee could remove the buildings, or that they were not fixtures annexed to the land.

The correctness of the doctrine here laid down is doubted, or, more strictly speaking, denied in *Kerr v. Kingsbury*, 39 Mich. 150. The Supreme Court of Massachusetts, however, in the same year, 1878, said: "When the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition, this is not the extension of or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture, under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed, which have become part of it. The occupation under the new lease is

in effect a surrender of the premises to the landlord under the old." (*Watriss v. National Bank*, 124 Mass. 571-576.) And the New York Court of Appeals, in *Loughran v. Ross*, (45 N. Y. 792), said: "A surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term." And in *Ewell on Fixtures* (p. 174), this is said to be well settled.

If that be so, it logically follows that the rights of the plaintiff and his grantor, Anderson, must be viewed in the same light as they would be if the buildings had been erected before, and had been standing upon the land at the time of the execution of the first lease; or as if the second or any subsequent lease had been in fact the first. And viewed in that light, it is quite clear that the buildings standing upon the premises were a part of the realty, and would have passed with it by deed, although not specifically mentioned in it.

And it appears by the record that prior to the time of the alleged interference of the defendant with the removal of said buildings, the premises had been conveyed by Anderson's lessors to other parties.

There can be no question that in the absence of any agreement to the contrary, a dwelling-house and barn erected upon the land of his landlord by a tenant would, when so erected, be annexed to the realty. In *Van Ness v. Packard*, (2 Pet. 137), Story, J., delivering the opinion of the Court, observed that "if the house was built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture falling within the general rule, and immovable."

We think it quite clear that if the consequence of taking a lease of the premises after said buildings had been erected thereon, was to place the lessor and lessee in the same positions that they would have respectively occupied in the absence of any former lease, the finding of the Court that said buildings were, on the 9th day of March, 1876, the personal property of the plaintiff, is not sustained by the evidence, and the judgment and order appealed from must be reversed.

Judgment and order reversed, and cause remanded for new trial.

We concur: Morrison, C. J., McKinstry, J., Ross, J., Thornton, J., McKee, J.

IN BANK.

[Filed January 26, 1883.]

No. 8332.

NEWBILL ET AL., APPELLANTS,

VS.

WHITFIELD ET AL., RESPONDENTS.

MINING CLAIM—LOCATION—EJECTMENT—FINDINGS—MONUMENTS. Ejectment for a mining claim. *Held*, certain findings were not sustained by the testimony.

Appeal from Superior Court, San Bernardino County.

Harris & Allen, Bucknell & White and Larrabee, for appellants.

Satterwhite & Curtis, Boyer & Gibson, Rowell and Bledsoe, for respondents.

Ross, J., delivered the opinion of the Court:

The contest on this case is between the claimants of two certain mining claims called, respectively, the Red Jacket and Burning Moscow, situated in Grapevine Mining District, in the Calico Mountains of San Bernardino County. The action is ejectment—plaintiffs claiming the lode in question to be within the lines of the Red Jacket, and the defendants that it is a part of the Burning Moscow.

The fact is not disputed that the plaintiff Newbill discovered the Red Jacket on the 26th day of March, 1881, whatever its lines may be held to be. On that day, in traversing the mountain, he discovered certain veins of rock running in a northwesterly and southeasterly direction, and containing minerals of value, and with the intention of locating a mining claim thereon pursuant to the laws of the United States, and of the local customs and rules of the district, he placed a discovery-stake in the ground near the vein, with a written notice signed by him, claiming 300 feet on each side of the ledge, and running 500 feet southeasterly and 1000 feet northwesterly along the vein, and stating in the notice that he claimed twenty days within which to mark the boundaries and record his claim—the time claimed being the time allowed by the local rules and customs of the district for that purpose. A few days afterward, and before the 11th day of April, 1881, Newbill again went upon his claim, named it Red Jacket, and commenced to mark its boundaries. For the purposes of our decision we shall assume—what is strenuously denied by the appellants—that the evidence sustains the finding of the

Court below to the effect that at that time he (Newbill) "erected a stone monument about 500 feet southeasterly from the discovery-stake and notice aforesaid, with a written notice thereon marked southeastern end of Red Jacket, and at the same time erected another similar stone monument about 300 feet northerly from the last-named monument, and put a written notice thereon, marked northeast corner of Red Jacket."

Owing to sickness, Newbill was obliged to suspend work, and did not do anything further at that time in locating or marking the boundaries. Continuing sick, he agreed with his co-plaintiffs—Wallace, Parks and Ferrell—that they should go upon the ground and complete the location and marking of the boundaries of the claim, in consideration of which they were to have an undivided half of it. Accordingly, on the 12th of April, 1881, Wallace, Parks and Ferrell went upon the ground and marked out the boundaries of the Red Jacket claim, not, however, in precise accordance with the discovery-notice put up by Newbill on the 26th of March, nor in accordance with the subsequent monuments put up by him and marked as the southeastern end and the northeastern corner of the Red Jacket, but they marked the boundaries so as to extend about 600 feet along the vein northwesterly, and about 900 feet southeasterly from the discovery-stake and notice, with a width of a little less than 300 feet on each side of the vein and including the discovery-stake and notice. Such boundaries were marked by erecting a rock monument at each corner, and at the middle of each end and at the middle of the north or northeast side line, and placing written notices on each corner monument marked respectively: Northeast corner Red Jacket, northwest corner Red Jacket, southwest corner Red Jacket and southeast corner Red Jacket, and on the southeast center end monument was placed a written notice of which the following is a copy:

" NOTICE OF LOCATION OF QUARTZ CLAIM:

Notice is hereby given to all whom it may concern, that we, G. B. Wallace, H. C. Parks, P. H. Newbill, J. B. Ferrell, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock, in place bearing silver and nickel, within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, Chapter Six, Title Thirty-two, located 1500 linear feet of this vein or lode, with surface ground 600 feet in width, situated in Grapevine Mining District, county of San Bernardino, State of California,

and known as the Red Jacket Gold and Silver and Nickel Quartz Mining Claim, and extending 1500 feet to monument southeast to center of claim; this is the southeast end of claim; and 300 feet northeastern center of Red Cloud, extending northwest 1500 feet to northwest center of Red Jacket from this notice of the discovery or prospect shaft, the exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monuments, and more particularly described as follows, to wit: Commencing at this notice and bearing westerly 1500 feet from this notice to a monument on center of claim; thence 300 feet southwest to north corner of Red Cloud Mine; thence 1500 feet along this line of Red Cloud; thence 300 feet north to center of claim; thence 300 [feet] northeasterly to corner; thence 300 [feet] to center of lead; and we intend to hold and work said claim as provided by the local customs and rules of miners and the mining statutes of the United States.

Dated on the ground, this 26th day of March, 1881.

Discovered March 26, 1881.

Located April 1st, 1881.

P. H. NEWBILL, Locator.

P. H. Newbill, G. B. Wallace, H. C. Parks, J. B. Ferrell."

All of the monuments thus erected by Wallace, Parks and Ferrell on the 12th of April were, according to the findings of the Court below, placed in plain and conspicuous places, except the southeast center-end monument, on which was placed the notice above copied, which monument, according to the findings, "was not placed in a plain and conspicuous place, but at the bottom of a deep and abrupt declivity or gulch, in an obscure place, where it was not likely to be seen by persons looking for monuments or passing through the country, and it was much smaller than any of the other monuments mentioned." This finding of the Court we think unsupported by the evidence. Neither the testimony of Wiggins, Ray nor Parks, cited by counsel for respondents, sustains it. On the contrary, the testimony of Parks is, that a man going upon the ground to locate mining claims would have been apt to have seen it without tracing the monuments around. "He could have found it if he started to go up the mountain. It is the only pass by which he could get up there, and that notice stood right in the pass. He couldn't miss the monument," said the witness. Moreover, we can conceive of no motive on the part of Wallace, Parks and Ferrell, or either of them, for putting the notice in an obscure place. The very purpose of posting it was to assert a claim, not to conceal one.

So, also, the evidence is insufficient to sustain the finding of the Court below to the effect that the two monuments which the Court finds were erected by Newbill prior to April 11th, and marked, respectively, southeastern end of Red Jacket and northeast corner of Red Jacket, were to the knowledge of Wallace, Ferrell and Parks standing and allowed to remain at, and subsequent to, the time they marked the boundaries of the Red Jacket on the 12th of April. Not only is there no evidence that they had actual knowledge of such monuments, but it would seem incredible that they would have left them standing as indicating the extent of the Red Jacket, when, at the very same time, they so carefully marked out, and built monuments on, other boundaries of that claim, which extended far beyond the monuments which it is said they knowingly left standing.

At all events, when the defendants went on the ground on the 16th and 17th days of July, 1881, they found, or could have found if they had looked, the monuments—eight in number—erected by Wallace, Parks and Ferrell on the 12th of April, with the notices above indicated. Those boundaries included the premises in controversy. For them, the defendants saw, or ought to have seen, that the ground was appropriated by others, and was not open to location by them.

But it is said for the defendants that they were misled by the two monuments found by the Court to have been erected by Newbill prior to April 11th. That this was not so is conclusively shown by the fact that defendants did not *respect those monuments*; for they so located their claim as to embrace ground included within them as well as within the boundaries marked out by Wallace, Ferrell and Parks on the 12th of April.

Judgment and order reversed, and cause remanded to the Court below for a new trial.

We concur: McKinstry, J., Morrison, C. J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed January 25, 1883.]

No. 8637.

FRAZER, APPELLANT,

vs.

BARLOW ET. AL., RESPONDENTS.

MECHANIC'S LIEN—PLEADING—DEMURRER. The notice of lien, made part of the complaint, contained statements inconsistent and contrary to those on the same subject, contained in the complaint itself. *Held*, the Court properly sustained a demurrer to the complaint on the ground of ambiguity and uncertainty.

Appeal from Superior Court, Sacramento County.

L. S. Taylor, for appellant.

G. L. Johnson, for respondents.

By the COURT:

Appeal from a judgment upon demurrer entered after plaintiff had declined to amend his complaint.

The action was against three defendants—Barlow, Cronkite and Ellis—to foreclose a mechanic's lien for a balance due for lumber and materials furnished and used in the construction of a dwelling-house on a lot of land in the city of Sacramento.

The notice of lien was included in and made part of the complaint. The notice contains the statements that Cronkite and Ellis were the reputed owners of the land upon which the house was built; that the materials which were used in its construction were furnished to Barlow, Cronkite and Ellis by the plaintiff. It contains no statement of the date when the building was completed, but it does state that thirty days had not elapsed since the completion of the building. On the other hand, the complaint itself alleges that Ellis was the sole owner of the land; that the materials were furnished to Barlow and Cronkite, who had paid the cost of the same, except a balance, which remained due and unpaid on the 31st of October, 1881, and that the house in the construction of which the materials were used, "was completed — November, 1881," and the notice of lien was filed "December 2, 1881." These inconsistent and contradictory statements made the complaint ambiguous, uncertain, and demurrable.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed December 30, 1882.]

No. 8596.

JACKSON, RESPONDENT,

v.

BECKMAN ET AL., APPELLANTS.

CORPORATION—SUBSCRIBERS. *Mitchell v. Beckman*, 8582, followed.

Appeal from Superior Court, Sacramento County.

Cadwalader & Devlin, for appellants.

Catlin & Hamburger and *Edgerton*, for respondent.

By the COURT:

Upon the authority of *Mitchell v. Beckman*, 8582, judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 7446.

SWEENEY & CO., RESPONDENTS,

v.

SUTRO & CO., APPELLANTS.

WARRANT—BROKER—ATTORNEY—SALE—MANDAMUS. The Court, by mandamus, directed the Auditor of the city and county of San Francisco to issue a warrant to plaintiffs in the action for the writ (plaintiffs herein) "or their attorney" therein. The warrant was so issued and the attorney sold it to defendants. *Held*, defendants, when they purchased it, were not bound to inquire further into the matter of title than to see that it conformed to the direction given by the Court. Defendants acquired a good title by the purchase from the attorney, and having paid him for the warrant, they are not responsible to plaintiffs.

Appeal from Superior Court, San Francisco.

E. J. Moore, for appellants.

J. B. Hart, for respondents.

THORNTON, J., delivered the opinion of the Court:

The action was brought to recover of defendants a warrant or audited account, issued by the Auditor of the city and county of San Francisco, or its value. It appears that the account was presented to the Board of Supervisors and allowed by it. It was then presented to the Auditor to be allowed by him. This he refused. It was finally allowed by the Auditor under a peremptory writ of mandate. The Court by its judgment directed the auditing of the account and the issuance of a warrant in the usual form to the plaintiffs in the action for the writ "or their attorney therein." The Auditor allowed the account and issued the warrant, in accordance with the order of the Court, to J. P. Sweeney & Co., or M. J. Cobb (the latter being the attorney referred to). Cobb sold the warrant to defendants. These facts appear clearly in the evidence.

We are of opinion that the warrant was issued in accordance with the judgment of the Court, and that being the case, the defendants, when they purchased it, were not bound to inquire further into the matter of title than to see that it conformed to the direction given by the Court. The defendants acquired a good title by the purchase from Cobb, and having paid Cobb for the warrant, they are not responsible to the plaintiffs herein.

As the foregoing must dispose of the case, it is unnecessary to determine the other questions discussed on the argument.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: *Myrick, J., Sharpstein, J.*

DEPARTMENT No. 2.

[Filed January 25, 1883.]

No. 7634.

BURNHAM ET AL., APPELLANTS,

VS.

McNALLY ET AL., RESPONDENTS.

FINDINGS—APPEAL—CONFLICT OF EVIDENCE. Where there is a substantial conflict of evidence, the appellate Court will not interfere with the judgment of the Court below.

Appeal from Superior Court, San Francisco.

Walter Van Dyke, for appellants.

Charles F. Hanlon, for respondents.

By the COURT:

The only question in this case is as to whether the findings are sustained by the evidence. There is a substantial conflict in the evidence, therefore the Court will not interfere.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 25, 1883.]

No. 8190.

BOVO, APPELLANT, v. BOVO, RESPONDENT.

DIVORCE—COMMUNITY PROPERTY—DECREE. Defendant was charged with adultery; denial by her and cross-complaint for a divorce, on the ground of extreme cruelty. A divorce was granted, but upon what ground did not appear. Appeal by plaintiff, asking a modification of the decree which awarded defendant nearly one-half of the community property. *Held*, it did not appear that the Court below abused its discretion. (146 C. C.)

Appeal from Superior Court, San Francisco.

Nagle and Loughborough, for appellant.

Swain, Craig and Dunand, for respondent.

By the COURT:

Plaintiff brought his suit for a divorce, charging the defendant with adultery, and defendant, after denying the charge in her answer, filed a cross-complaint praying a divorce from the plaintiff on the ground of extreme cruelty. The Court granted a divorce, but upon what ground does not appear in the transcript. Plaintiff appealed, and asks for a modification of the decree.

The point is made that the Court awarded the defendant too large a proportion (nearly one-half) of the community property. Section 146 of the Civil Code provides that "if the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the Court, from the facts of the case and the condition of the parties, may deem just."

In view of all the facts of the case, as established by the evidence, we cannot say that the Court awarded too large a portion of the community property to the defendant, and therefore we are not prepared to reverse the judgment for abuse of discretion. The circumstances found in the case of *Brown v. Brown* (9 Pac. C. L. J. 580) were very different from those appearing in the transcript in the present case, and therefore that case is not authority in this. There is no error in the proceedings demanding a reversal.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 25, 1883.]

PAGE, RESPONDENT, vs. LATHAM, APPELLANT.

ATTACHMENT—AFFIDAVIT—MORTGAGE—LIMITATION OF ACTION—SECURITY.

Action on promissory notes. The affidavit for attachment contained the recital "that originally, at the time of the making of said notes, the said defendant executed and delivered to one N. Page a mortgage upon real property purporting to secure the payment of said two notes and the interest, but that said N. Page was not then, nor has he since been, the holder or the owner of said notes, or either of them, and that said mortgage has become valueless without any fault of this plaintiff, or of the said N. Page, by reason of the lapse of time." Held, the motion to dissolve the attachment should have been granted. The only ground stated in the affidavit upon which the plaintiff claims that the mortgage given as security for the payment of the notes has become valueless, is lapse of time. The plaintiff does not know, nor can he, until demurrer or answer, whether or not the plea of the Statute of Limitations will be interposed. If that plea should not be interposed, the security would remain.

Id.—Id. Further: Plaintiff could have brought his action for foreclosure within the time; if he omitted to do so, it was his own act by which the security became valueless.

Appeal from Superior Court, San Francisco.

B. S. Brooks, for appellant.

Rhodes & Burstow, for respondent.

By the COURT:

The motion to dissolve the attachment should have been granted. The only ground stated in the affidavit upon which the plaintiff claims that the mortgage given as security for

the payment of the note has become valueless is lapse of time. The plaintiff does not know, nor can he until demurrer or answer, whether or not the plea of the Statute of Limitations will be interposed. If that plea should not be interposed the security would remain. Besides, if a person permits the statutory time to pass, is it not his act? He could have brought his action for foreclosure within the time; if he omitted to do so, it was his own act by which the security became valueless.

Order reversed and cause remanded, with instructions to grant the motion.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 8467.

BRODRIBB, GUARDIAN, ETC., RESPONDENT,

v.

TIBBETTS ET AL., APPELLANTS.

GUARDIAN—OBJECTION—APPEAL—TRANSCRIPT—PROBATE COURT—PRESUMPTION—MORTGAGE—EVIDENCE. Foreclosure brought by a ward in the name of a guardian, who is the successor of a former guardian with whom the contract was made. On the trial defendant objected to the admissibility in evidence of the order of removal and the appointment of a successor, on the ground that no notice or citation had been served on the former guardian to show cause why he should not be removed. The orders of the Court were received in evidence, but were not brought before the appellate Court. There was nothing in the transcript, except the statement in the objection, showing that he was not served. *Held*, the presumption is in favor of the action of the Court below.

ID.—ID. The proceedings of the late Probate Court are to be construed in the same manner as the proceedings of Courts of general jurisdiction (98 C. C. P., before amendments of 1880).

Appeal from Superior Court, San Bernardino County.

L. C. Tibbetts, for appellants.

Paris & Bledsoe, for respondent.

By the COURT:

There are many points attempted to be presented and allegations of error made in the transcript before us, the relevancy or materiality of which are not apparent to us. We see but one point which we deem worthy of notice, and that is in reference to the removal of the former guardian.

On the trial the defendants objected to the admissibility in evidence of the order of removal and the appointment of a successor, on the ground that no notice or citation had

been served on the former guardian to show cause why he should not be removed. The orders of the Court were received in evidence, but are not brought before us, therefore there is nothing in the transcript, except the statement in the objection, showing that he was not served—and in such case we may presume that the action of the Court was correct and well founded. The proceedings of the late Probate Court are to be construed in the same manner as the proceedings of Courts of general jurisdiction. Sec. 98 C. C. P., before amendments of 1880.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 7407.

HILLS, RESPONDENT, v. OHLIG ET AL., APPELLANTS.

MECHANIC'S LIEN—CLAIM—TIME GIVEN—CONTRACT—PAYMENT. The claim of lien stated that plaintiff was by the contract to perform work and labor and furnish materials for the alteration, construction and repairing of a certain building; that he did perform the work and labor and furnish materials for the purpose indicated; that it was agreed he was to be paid for the same what they should be reasonably worth, and that they were reasonably worth \$601.80. *Held*, the claim was sufficient.

Id.—Id.—The words of the statute (C. C. P. 1187), "time given," mean the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract.

Id.—Id. As no distinct time was agreed on, the time of payment was left to the rule fixed by the law on the state of facts. When this is the case, no time is given in contemplation of law, and the requirement that the "time given" must be stated does not apply.

Id.—Id. If the words "time given" refer to the time agreed on for the completion of the contract, and no period of time for such completion is fixed by the contract, but such time is allowed as the law gives, the same rule applies, and no time need be stated in the claim.

Appeal from Superior Court, San Francisco.

J. C. Bates, for appellant.

L. J. Hardy, for respondent.

By the COURT:

Action to foreclose a mechanic's lien.

The only point presented for decision relates to the claim of lien filed in the Recorder's office. The claim as filed states that the plaintiff was by the contract to perform work and labor and furnish materials for the alteration, construction and repairing of a certain building; that he did perform the work and labor and furnished materials for the purpose indicated; that it was agreed he was to be paid for the same

what they should be reasonably worth, and that they were reasonably worth \$601.80.

The law requires that the claim filed shall contain *inter alia* a statement of the terms, time given, and conditions of the contract (C. C. P. 1187), and it is urged that the *time given* was not stated in the claim. So far as we can see, all the terms and conditions are stated. We cannot judicially say that they are not stated as agreed on by the parties and expressed in the contract. The words of the statute, "*time given*," in our judgment mean the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract. As said above, we cannot say that the contract is not accurately stated; that is, stated as made and agreed on. If this is so, no distinct time was agreed on, but the time of payment was left to the rule fixed by the law on such a state of facts. When this is the case, no time is given in contemplation of law, and the requirement that the "*time given*" must be stated does not apply. If the words "*time given*" refer to the time agreed on for the completion of the contract, and no period of time for such completion is fixed by the contract, but such time is allowed as the law gives, the same rule applies, and no time need be stated in the claim.

We are of opinion that the claim, as filed, complied with the statute, and is sufficient.

Judgment affirmed.

DEPARTMENT No. 1.

Filed January 24, 1883.
No. 8556.

KELLY, RESPONDENT,
v.

TEAGUE ET AL., APPELLANTS.

UNLAWFUL DETAINER—LEASE—NOTICE—COVENANT—TAXES—CONDITION—ACTION—LANDLORD—TENANT. Complaint for restitution of premises and forfeiture of lease. The lease contained a covenant that the lessee would pay all taxes and assessments levied upon the premises during the term; the lessee failed to pay the taxes for a fiscal year during the term; the premises were sold for taxes. *Held*, by Sub-division 3 of Section 1161 C. C. P., as it now exists and has existed since April 1, 1878, the right of action by the landlord against the tenant accrues upon the latter continuing in possession of the demised premises in person or by sub-tenant after a neglect or failure to perform any condition or covenant of the lease, and no notice to him to perform is required if it appears that the covenant or condition cannot afterward be performed by him.

Id.—COUNTER-CLAIM—PLEADING. Unlawful detainer is not a proper case for a counter-claim.

Appeal from Superior Court, San Francisco.

J. C. Bates, for appellants.

Jarboe & Harrison and Goodfellow, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The complaint in this case alleges that on the 10th day of February, 1875, plaintiff leased to defendant Teague a certain lot of land in the city of San Francisco, for the term of ten years, at the monthly rental of fifty dollars; that the lease contained a covenant on the part of the lessee to pay "all the taxes and assessments that would be levied upon said premises during the term;" that defendant entered into possession of the premises under the lease on the first day of March, 1875, and has held the possession ever since either in person or by sub-tenant; that taxes and assessments to the amount of \$152.88 were levied upon the premises for the fiscal year ending June 30, 1882; that said sum became due and was payable on the 26th day of December, 1881; that defendants failed to pay the taxes and assessments prior to the 28th day of March, 1882, and by reason of such failure the premises were sold for taxes and assessments due thereon. The complaint further alleges that on the 13th day of April, 1882, the plaintiff served on each of the defendants a notice in writing, requiring them within three days after the service of the notice to perform the condition contained in the lease or deliver up to the plaintiff the possession of the premises. The answer denies generally all the averments in the complaint, and also sets up a counter-claim. Plaintiff had judgment for restitution of the possession and costs of suit.

The action was brought under Section 1161 of the Code of Civil Procedure, and was not a proper case for a counter-claim.

The first point made in defendants' brief is, that the complaint was fatally defective, for the reason that there was no allegation of non-payment of taxes; and the second point is, that the notice was fatally defective, because it did not state any amount or the year for which the taxes were due. Neither of these points is well taken. The complaint is sufficient, and no notice was required. The tenant covenanted to pay the taxes, and the law fixes the time within which taxes must be paid. The defendant was in default, and had broken the covenant of the lease before the notice was received. In the case of the *Opera House v. Bert*, 52 Cal. 471, the Court say: "But whether the breach did or did not operate a forfeiture, which would justify *ejectment*, an action in the present form in the County Court can be maintained only upon a refusal to perform a covenant which can be performed after breach, and the notice contemplated by the

statute." The lease in that case was made in 1875, and the forfeiture insisted upon occurred in August, 1876. The present action is brought under a statute approved April 1, 1878, which was intended, as may be justly inferred, to cover just such a case as the former statute did not embrace.

By Section 1161 of the Act of 1878 (Sub. 3 C. C. P.), it is *provided* that "if the covenants and conditions of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed therein, need be given to said lessee or his sub-tenant demanding the performance of the violated covenant or conditions of the lease."

By the provisions of the Code as it now exists, and has existed since April, 1878, the right of action by the landlord against the tenant accrues upon the latter continuing in possession of the demised premises in person or by his sub-tenant after a neglect or failure to perform any condition or covenant of the lease, and no notice to him to perform is required if it appears that the covenant or condition cannot afterward be performed by him.

Judgment and order affirmed as of October 30, 1882.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed January 29, 1883.]

No. 7662.

PILLSBURY, RESPONDENT, v. EATON, APPELLANT.

APPEAL. There being a substantial conflict in the evidence, and no error appearing, the judgment will be affirmed.

Appeal from Superior Court, San Francisco.

Wheaton and Scrivner, for appellant.

D. S. Terry, for respondent.

By the COURT:

There being a substantial conflict in the evidence, and no error appearing, the judgment and order are affirmed.

DEPARTMENT No. 2.

[Filed January 30, 1883.]

No. 7654.

SAVINGS AND LOAN SOCIETY, RESPONDENT, v. BATEMAN ET AL., APPELLANTS.

TRUST DEED—EJECTMENT—TITLE. This case is determined by the decision in *Bateman v. Burr*, 57 Cal. 480.

Appeal from Superior Court, San Francisco.

M. Mullany, for appellants.

A. N. Drown, for respondent.

By the COURT:

This cause is determined by the decision in *Bateman v. Burr*, 57 Cal. 480. Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 26, 1883.]

No. 8604.

BOLAN, RESPONDENT,

vs.

THE CAL. SOUTHERN R. R. CO., APPELLANT.

NEGLIGENCE—CASE FOLLOWED. *Trask vs. California Southern Railroad*,
No. 8603, followed.

Appeal from Superior Court, San Diego County.

Cooper and Luce, for appellant.

Leach & Parker, for respondent.

By the COURT:

The plaintiff in this case was injured under the same circumstances as the plaintiff in *Trask* against the same defendant, No. 8603. The case is substantially the same and must be ruled the same way.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed January 25, 1883.]

No. 7627.

GAYLORD, APPELLANT,

v.

POTRERO AND BAY VIEW R. R. CO., RESPONDENT.

PERSONAL INJURY—DAMAGES—APPEAL—SURVIVOR OF ACTION. It appearing in the appellate Court that plaintiff in the action had died since appeal taken by him, and that the action was for damages for injuries to the person, which cause of action did not survive him, *held*, the appeal would be dismissed without prejudice.

Appeal from Superior Court, San Francisco.

Sharp & Sharp, for appellant.

Cope & Boyd, for respondent.

By the COURT:

It being suggested to the Court that plaintiff has died since the appeal was taken by him, and that the action was brought to recover damages for injuries to the person, which cause of action did not survive him, it is ordered that the appeal be dismissed without prejudice.

Rehearings granted: 8412—*Dean v. Superior Court*, Jan. 12, 1883; 7256—*Dyer v. Hudson*, Jan. 12, 1883; 7547—*Preston v. Hood*, Jan. 12, 1883; 8626—*Estate of Magee*, Jan. 13, 1883; 7238—*Adams v. Dohrmann et al.*, Jan. 15, 1883; 8639—*Carney et al. v. Arizona Gold Mg. Co.*, Jan. 20, 1883.

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